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LEGAL ASPECTS OF THE INTERNATIONAL CONTROL OF ATOMIC ENERGY

By M. E. BATHURST, C.B.E.
Legal Adviser, United Kingdom Delegation to the United Nations

I. *Introduction*

ON 3 October 1945 the President of the United States informed Congress that he proposed to initiate discussions, first with the United Kingdom and Canada, and then with other nations, in an effort to reach agreement on the conditions under which international co-operation might replace rivalry in the field of atomic power.[1] In the next month, at Washington, the President of the United States, the Prime Minister of the United Kingdom, and the Prime Minister of Canada issued a Declaration[2] of their opinion that, in order to attain the most effective means of eliminating entirely the use of atomic energy for destructive purposes and promoting its widest use for industrial and humanitarian purposes, a commission should be set up at the earliest practicable date, under the United Nations, to prepare recommendations for submission to that Organization. In particular, the Declaration added, the commission should make specific proposals:

(*a*) For extending between all nations the exchange of basic scientific information for peaceful ends.
(*b*) For control of atomic energy to the extent necessary to ensure its use only for peaceful purposes.
(*c*) For the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.
(*d*) For effective safeguards by way of inspection and other means to protect complying states against the hazards of violations and evasions.

The Declaration contemplated that the work of the commission should proceed by stages, the successful completion of each one of which would develop the necessary confidence of the world before the next stage is undertaken.

The proposals contained in this Declaration were considered at the next meeting of the Council of Foreign Ministers in Moscow in December 1945.[3] The Soviet Government offered only a few amendments to the

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[1] 'Message to Congress on the Development and Control of Atomic Energy', 3 October 1945, *Congressional Record*, vol. 91, Part 7, pp. 9322–3.

[2] 'Agreed Declaration on Atomic Energy', Washington, 15 November 1945, *U.S. Department of State Bulletin*, 13 (1945), 781.

[3] See *The International Control of Atomic Energy: Growth of a Policy*, U.S. Department of State Publication 2702, pp. 27–8.

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proposals. These amendments were designed to clarify the relationship of the proposed commission to the Security Council of the United Nations, and, with some revision, the United Kingdom and United States Foreign Ministers accepted them. The four fields of action, enumerated above, which the Washington Declaration had suggested for the commission were agreed. The commission would be composed of one representative from each of the states represented on the Security Council, and one from Canada when that state was not a member of the Council. The three Governments represented at the Council of Foreign Ministers invited Canada, China, and France to join with them in supporting these proposals at the first part of the First Session of the General Assembly of the United Nations in London in January 1946.[1]

The United Kingdom Delegation, acting on behalf of the five permanent members of the Security Council and Canada, proposed to the General Assembly that the resolution drafted at Moscow for the establishment of a Commission on Atomic Energy be added to the agenda of the Assembly.[2] The Assembly referred the proposal to its Political and Security Committee (Committee I) which, after a brief debate, approved the draft resolution, without change, by 46 votes to none, with one abstention.[3] After a further brief debate on 23 January the Committee approved unanimously the report of its rapporteur on the proposal.[4] On 24 January the report and the resolution establishing a Commission on Atomic Energy were approved by the General Assembly at its seventeenth Plenary Meeting without a dissenting vote.[5] Under the resolution[6] the terms of reference of the Commission are as follows:

> 'The Commission shall proceed with the utmost dispatch and enquire into all phases of the problem, and make such recommendations from time to time with respect to them as it finds possible. In particular, the Commission shall make specific proposals:
>
> (*a*) for extending between all nations the exchange of basic scientific information for peaceful ends;
>
> (*b*) for control of atomic energy to the extent necessary to ensure its use only for peaceful purposes;
>
> (*c*) for the elimination from national armaments of atomic weapons and of all other weapons adaptable to mass destruction;

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[1] *Joint Communiqué*, Meeting of Foreign Ministers, 27 December 1945, section VII, *U.S. Department of State Bulletin*, 13 (1945), pp. 1027, 1031.

[2] *Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly, Verbatim Record, 10 January–14 February 1946*, Annex 2, p. 564.

[3] *Official Records of the First Part of the First Session of the General Assembly, First Committee, Summary Record of Meetings, 11 January–12 February 1946*, p. 11.

[4] Ibid., p. 14.

[5] *Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly, Verbatim Record, 10 January–14 February 1946*, p. 267.

[6] Ibid., pp. 258–9; *Resolutions adopted by the General Assembly during the First Part of its First Session*, Document A/64, 1 July 1946, Resolution 1 (I), p. 9.

(*d*) for effective safeguards by way of inspection and other means to protect complying states against the hazards of violations and evasions.

'The work of the Commission should proceed by separate stages, the successful completion of each of which will develop the necessary confidence of the world before the next stage is undertaken.

'The Commission shall not infringe upon the responsibilities of any organ of the United Nations, but should present recommendations for the consideration of those organs in the performance of their tasks under the terms of the United Nations Charter.'[1]

The resolution provided that the Commission should be composed as had been suggested in the proposals agreed at the Council of Foreign Ministers.[2] The Commission was directed to submit its reports and recommendations to the Security Council.[3]

The United Nations Atomic Energy Commission held its first meeting on 14 June 1946 at Hunter College, New York.[4] A committee of the Commission drew up Provisional Rules of Procedure for the Commission.[5] These Provisional Rules were adopted by the Commission at its fourth meeting on 3 July[6] and approved by the Security Council on 10 July.[7] A Working Committee of the Commission, composed of one representative from each nation represented on the Commission, was set up[8] to consider all proposals and suggestions made at sessions of the Commission and to make its recommendations thereon to the Commission.

The Working Committee then created three other committees with specific terms of reference and functions:[9] Committee 2, to examine questions associated with the control of atomic energy activities and to make specific recommendations thereon; a Legal Advisory Committee, to examine the legal aspects of the relationships between the systems or measures of control as recommended by Committee 2 and the United Nations, and ultimately to submit a draft treaty or treaties to the Working Committee; and a Scientific and Technical Committee, to advise on the scientific and technical aspects of the problem.

Committee 2 has made a 'First Report on Safeguards required to ensure the Use of Atomic Energy only for Peaceful Purposes'.[10] The Scientific and

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[1] Section 5. [2] Section 3. [3] Section 2 (*a*).

[4] Atomic Energy Commission, *Official Records*, No. 1.

[5] United Nations Document AEC/4, 18 June 1946.

[6] Atomic Energy Commission, *Official Records*, No. 4, p. 68. The Provisional Rules of Procedure are printed in *Supplement No. 2* to the *Official Records*. The Rules provide, *inter alia*, that the chairmanship of the Commission shall be held in turn, for one calendar month, by the states represented on the Commission in the English alphabetical order of their names (Rule 14), and that all decisions of the Commission shall be made by a majority of the members of the Commission (Rule 33).

[7] Security Council, *Official Records*, First Year, Second Series, No. 1, p. 7.

[8] At the third meeting of the Commission on 25 June 1946: Atomic Energy Commission, *Official Records*, No. 3, p. 59.

[9] United Nations Document AEC/WC/P.V./2, 12 July 1946.

[10] *First Report of the Atomic Energy Commission to the Security Council* (Document AEC/18/Rev. 1, 3 January 1947, Part V).

Technical Committee has produced a 'First Report on the Scientific and Technical Aspects of the Problem of Control'.[1] The Atomic Energy Commission itself has presented two reports to the Security Council, the first on 31 December 1946,[2] and the second on 11 September 1947.[3]

This article attempts to indicate some of the legal aspects of the recommendations made in these two reports of the Commission. It is not its purpose to discuss differences between the majority and minority views on the control of atomic energy which have appeared in the course of the Commission's work.[4]

II. *The Charter of the United Nations*

The question of the control and development of atomic energy was neither considered nor dealt with when the Charter of the United Nations was drawn up at San Francisco. It was clear at the outset of the work of the United Nations Atomic Energy Commission that any proposals for the international control of atomic energy raised certain constitutional issues in relation to the Charter. A preliminary question was the extent of the Security Council's 'primary responsibility for the maintenance of international peace and security' under paragraph 1 of Article 24 of the Charter,[1] and its relationship to any proposed system of control. The Security Council's 'primary responsibility' under Article 24 might, for example, be construed to include responsibility for the control of atomic energy, and, if this were so, it might be legally necessary under the Charter for any system of control to be the exclusive responsibility of the Security Council. The Charter so construed would exclude the establishment, within the United Nations, of any autonomous organ to exercise control over the production, use, and development of atomic energy by nations. Another consideration was the extent of the responsibility of the Security Council under Article 26 (relating to the formulation of plans for the establishment of a system for the regulation of armaments)[2] and its relevance to atomic energy control.

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[1] *First Report of the Atomic Energy Commission to the Security Council* (Document AEC/18/Rev. 1, 3 January 1947, Part IV).

[2] *First Report of the Atomic Energy Commission to the Security Council* (Document AEC/18/Rev. 1, 3 January 1947), adopted by the Commission on 30 December 1946, with ten members voting in the affirmative and the representatives of Poland and the U.S.S.R. abstaining: Atomic Energy Commission, *Official Records*, No. 10, p. 164.

[3] *Second Report of the Atomic Energy Commission to the Security Council* (Document AEC/26, 8 September 1947), adopted by the Commission on 11 September 1947, with ten Members voting in the affirmative, the representative of the U.S.S.R. voting in the negative, and the representative of Poland abstaining: United Nations Document AEC/P.V.14, 11 September 1947, pp. 72–5.

[4] The proposals of the Government of the Soviet Union are to be found in statements by that Government's representative at the second and twelfth meetings of the Atomic Energy Commission on 19 June 1946 and 11 June 1947, respectively: Atomic Energy Commission, *Official Records*, No. 2, pp. 23–31; United Nations Document AEC/P.V.12, 11 June 1947, pp. 2 ff. The proposals made at the twelfth meeting of the Commission were the subject of a series of questions seeking clarification, addressed by the United Kingdom representative to the representative of the U.S.S.R. (Document AEC/C.2/71, 11 August 1947), to which the latter replied (Document AEC/C.2/109, 7 September 1947). Part IV of the *Second Report of the Atomic Energy Commission to the Security Council* (Document AEC/26, 8 September 1947) contains a report of the consideration of these proposals. Committee 2 decided on 15 August 1947 that these proposals and the explanations of them given during the discussion of them in that Committee 'do not provide an adequate basis for the development by the Committee of specific proposals for an effective system of international control of atomic energy': Document AEC/C.2/73, 18 August 1947. On 18 December 1947 the Working Committee decided that it would give further consideration to these proposals: Document AEC/C.1/P.V.33, 18 December 1947, p. 106. Further information on the views of the Soviet Government may be gathered from the proposed amendments and additions (Document S/283, 18 February 1947) to the *First Report of the Atomic Energy Commission to the Security Council* (Document AEC/18/Rev.1, 3 January 1947) submitted by the representative of the U.S.S.R. at the 108th meeting of the Security Council on 18 February 1947 (Document S/P.V.108, 18 February 1947). A summary of the Working Committee's discussions of these proposed amendments and additions, some of which were altered by the representative of the U.S.S.R. during those discussions, appears in Part III of the Second Report of the Commission.

A second question was whether the powers which the Security Council has under the Charter would be adequate to permit it to exercise effective control over the production, use, and development of atomic energy, if it were decided that it was necessary or desirable that such control should be the responsibility of the Security Council itself. The Council could, for example, establish 'subsidiary organs' under Article 29 of the Charter 'for the performance of its functions',[3] but whether the Council or a subsidiary organ of the Council would have sufficient powers under the Charter to carry out any proposed control measures would depend on the nature of those measures.

Finally, there had to be borne in mind the conditions limiting the exercise of the Security Council's jurisdiction under Chapters VI and VII of the Charter (relating respectively to the pacific settlement of disputes, and action with respect to threats to the peace, breaches of the peace, and acts of agression), and in particular the legal effect of paragraph 7 of Article 2 of the Charter (matters essentially within the domestic jurisdiction of a state)[4] with regard to any proposed atomic control measures.

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[1] Chapter V, Art. 24: '1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'

[2] Chapter V, Art. 26: 'In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.'

[3] Chapter V, Art. 29: 'The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.'

[4] Chapter I, Art. 2: '. . . 7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

The primary responsibility of the Security Council for the maintenance of international peace and security under Article 24 of the Charter clearly is not an exclusive responsibility.[1] It is a responsibility shared, under the Charter, by every Member of the United Nations.[2] Part of the responsibility rests also upon other principal organs of the United Nations—the General Assembly,[3] the Economic and Social Council,[4] and the Trusteeship Council.[5] Subsidiary organs of the United Nations established pursuant to paragraph 2 of Article 7 of the Charter[6] must also make their contributions to the maintenance of international peace and security, and may do so without infringing the primary responsibility of the Security Council.

The responsibility of the Security Council under Article 26 of the Charter, contemplating the establishment of a system for the regulation of armaments, does not imply that the Security Council must be the sole repository of all authority under such a system or that it must itself deal with every aspect of the establishment of the system.

None of the existing organs of the United Nations possesses under the Charter the managerial, proprietorial, inspecting, and licensing powers which are recommended by the Atomic Energy Commission as necessary for effective international control of atomic energy.[7] In this connexion the representative of Australia pointed out that much of the work of an atomic energy authority, if it were established, would be concerned with such matters as inspection, licensing, research, and development—matters quite distinct from the disputes, situations, threats to the peace, and breaches of the peace over which the Security Council is given jurisdiction by the Charter.[8] The jurisdiction of the Council can be invoked only if the proved or admitted circumstances of the particular case indicate international friction.[9] Under Chapter VI of the Charter the prerequisite for the Security Council's intervention is the existence of a dispute or situation the continuance of which is likely to endanger the maintenance of international peace and security;[10] if so, the Security Council may lawfully recommend appropriate procedures or methods of adjustment.[1] Under Chapter VII of the Charter direct action of a drastic character is open to the Security Council, but this is conditional upon the finding of a 'threat to the peace, breach of the peace, or act of aggression'.[2] The executive action open to the Security Council under this chapter is often referred to under the generic term 'sanctions'. The Australian delegation's memorandum, to which reference has been made above,[3] noted that the sanctions applied against nations for non-observance of rules which might be laid down by an international atomic energy authority would be of a very different character from those contemplated in connexion with action by the Security Council under Chapter VII.[4] Sanctions imposed by an international atomic energy authority for violations of the control system which could not be termed threats to the peace might amount to no more than the suspension or cancellation of a licence permitting a nation to produce fissionable material (the nuclear fuel of atomic energy) or atomic energy itself, or the withholding from that nation of the benefits of the use of atomic energy for industrial purposes. In short, the functions of an international atomic energy authority and the sanctions available to it would be different in nature from those of the Security Council under the Charter of the United Nations.[4]

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[1] Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents* (1946), p. 121.

[2] See Chapter I, Art. 1, para. 1, and Art. 2, paras. 3, 4, and 6.

[3] See Chapter IV, Arts. 11, 13, and 14.

[4] See Chapter X, Art. 62.

[5] See Chapter XII, Art. 76.

[6] Chapter III, Art. 7: '. . . 2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.'

[7] *Memorandum No. 3, submitted by the U.S. Representative on the Atomic Energy Commission, dealing with the Relations between the Atomic Development Authority and the Organs of the United Nations* (12 July 1946), Document AEC/WC/2, 17 July 1946, p. 36.

[8] *Analysis of the Relationship between Organised Measures for the International Control of Atomic Energy and the United Nations Organisation (particularly the Security Council)*, 8 July 1946, paragraph 9, Document AEC/WC/2, 17 July 1946, p. 31.

[9] Ibid., para. 10.

[10] Chapter VI, Art. 34.

The power to establish subsidiary organs given to the General Assembly and to the Security Council under Articles 22[5] and 29[6] of the Charter respectively would be inappropriate for the creation of an atomic energy authority as an organ of the United Nations, because those Articles make it clear that the functions of such subsidiary organs are limited to the performance of functions which belong to the respective parent bodies. As already mentioned, the functions of such an international authority would be quite different from the functions of the Security Council. Similarly, while the functions of the General Assembly are practically unlimited as to discussion, and very wide as to recommendation,[7] it possesses no direct executive authority. Accordingly, an atomic energy control authority could not be a subsidiary organ of the General Assembly and be vested by the Assembly with powers adequate to the functions with which it would be entrusted if the recommendations of the Atomic Energy Commission were adopted. Even if the Charter could be construed to allow the establishment of a subsidiary organ of the United Nations created by collective action of several of the existing principal organs and possessing an aggregate of powers delegated by each of them, such a subsidiary organ would still not have adequate powers under the Charter for effective international control of atomic energy.[1]

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[1] Chapter VI, Art. 36.

[2] Chapter VII, Art. 39.

[3] *Supra*, p. 6, n. 8.

[4] Paragraph 11.

[5] Chapter IV, Art. 22: 'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.'

[6] *Supra*, p. 5.

[7] Chapter IV, Arts. 10, 11, 12, 13, and 14.

The Soviet representative on the Atomic Energy Commission stated on 24 July 1946[2] that an opinion that the existing organs of the United Nations are not empowered by the Charter to deal with the control of atomic energy 'cannot be justified'. The Charter contains general provisions relating to the maintenance of peace and security without mentioning any specific kind of arms which may be used by a potential aggressor, and such general provisions are, in the Soviet Government's view, applicable no matter what kind of arms or armament are invented. The existing provisions of the Charter, in the opinion of that Government, provide full power and rights to the Security Council to deal with matters of atomic energy, a problem directly relating to the maintenance of peace and security.[3]

Paragraph 7 of Article 2 of the Charter provides that nothing in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the Charter. This principle is not, however, to prejudice the application of enforcement measures taken under Chapter VII of the Charter. The United States delegation to the Atomic Energy Commission has suggested[4] that, since this paragraph of Article 2 is confined to matters 'essentially within the domestic jurisdiction of any State', it would not be infringed by the powers which that delegation had suggested should be given under a multilateral treaty to an international atomic energy authority, inasmuch as matters relating to the use and development of atomic energy are necessarily of international concern. It seems clear that a matter which becomes the subject of an international agreement ceases to be a matter essentially within the domestic jurisdiction of any state which is a party to that agreement.[1] The United States delegation believed that specific recognition in the treaty that control of atomic energy cannot be essentially domestic but is predominantly international would be sufficient to render inapplicable this paragraph of Article 2 of the Charter.[2] In the General Findings in its First Report to the Security Council, the United Nations Atomic Energy Commission found 'that the development and use of atomic energy are not essentially matters of domestic concern of the individual nations, but rather have predominantly international implications and repercussions'.[3]

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[1] *Memorandum No. 3, submitted by the U.S. Representative on the Atomic Energy Commission, dealing with the Relations between the Atomic Development Authority and the Organs of the United Nations* (12 July 1946), Document AEC/WC/2, 17 July 1946, p. 36.

[2] United Nations Document AEC/WC/3, 24 July 1946, p. 1.

[3] Ibid., p. 2. The resolution passed unanimously by the General Assembly on 14 December 1946 on the Principles governing the General Regulation and Reduction of Armaments contemplates an international system of control and inspection, 'within the framework of the Security Council', operating through special organs which will derive their functions from the convention under which they are created: *Resolutions adopted by the General Assembly during the Second Part of its First Session,* Document A/64/Add.1, 31 January 1947, Resolution 41 (I), Sections 4 and 6, p. 65. The proposals made by the Soviet Union on 11 June 1946 include establishment of an International Control Commission 'within the framework of the Security Council', but having its own inspectorial apparatus. The Commission would carry out inspections and make recommendations to governments on atomic energy production and to the Security Council on measures for prevention and suppression of violations: Document AEC/P.V.12, 11 June 1947. Under these proposals sanctions against violators of the convention would be a matter exclusively for the Security Council: see Document AEC/C.2/109, 7 September 1947, p. 3.

[4] *Memorandum No. 3,* &c. (12 July 1946), p. 37.

III. *Prohibition of atomic weapons*

All the Governments which have been represented on the Atomic Energy Commission have agreed that the prohibition of the manufacture and use of atomic weapons by nations is an essential part of any system of international control of atomic energy. The United States proposals made to the Commission at its first meeting on 14 June 1946[4] contained the suggestion that a multilateral treaty establishing a control system should contain a prohibition of the 'illegal possession or use of an atomic bomb'. The Soviet delegation proposed on 19 June 1946[5] the immediate conclusion of a convention by which the parties would undertake:

(*a*) not to use atomic weapons in any circumstances whatsoever;
(*b*) to prohibit the production and storing of weapons based on the use of atomic energy;
(*c*) to destroy, within a period of three months from the day of the entry into force of the convention, all stocks of atomic energy weapons whether in a finished or unfinished condition.

There was, however, in the Atomic Energy Commission from the early stages of its work a widely held opinion that mere prohibition of the manufacture and use of atomic weapons is not enough; that simultaneously with prohibition there must be established some international system of inspection and control, so that a state party to any convention outlawing atomic weapons may be assured that the terms of the convention are being observed by other parties to it. As the Netherlands representative on the

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[1] Goodrich and Hambro, op. cit., p. 73. See the discussion of paragraph 7 of Art. 2 of the Charter during the second part of the First Session of the General Assembly in connexion with the complaint of the Government of India about the treatment of Indians settled in the territory of the Union of South Africa: *Official Records of the Second Part of the First Session of the General Assembly, Joint Committee of the First and Sixth Committees, Summary Record of Meetings, 21–30 November 1946*, pp. 3, 10, 15, 22, 23, 36, 41, 42. Cf. the Advisory Opinion given in 1923 by the Permanent Court of International Justice on Art. 15 (8) of the Covenant of the League of Nations in connexion with the French Nationality Decrees in Tunis and Morocco (French Zone): Series B, No. 4, pp. 23–4.

[2] Op. cit., p. 37.

[3] United Nations Document AEC/18/Rev.1, 3 January 1947, Part II C, General Finding 4.

[4] Atomic Energy Commission, *Official Records*, No. 1, p. 8.

[5] Ibid., No. 2, p. 27.

Commission pointed out at a meeting of Committee 2 on 26 July 1946,[1] the essence of the Soviet proposal mentioned above is to prohibit the production and use of atomic weapons without there being put into force simultaneously an effective system of international inspection and control. He observed[2] that the method of simply forbidding weapons, without simultaneous and concurrent implementation of safeguards, had been tried for centuries and had yielded very little, if anything, in the way of practical results. There is no reason to expect that the mere prohibition of atomic weapons would have better results. Rather the contrary is probable, for the reason that as the atomic weapon has such a vast destructive effect there will be a strong incentive to nations to run no risk of being annihilated but rather to be the first to use this weapon.[2]

The Board of Consultants to the United States Secretary of State's Committee on Atomic Energy stated that, in their opinion, a convention to 'outlaw' atomic weapons, unsupported by other measures, would put 'an enormous pressure upon national good faith', which would be aggravated by the atomic bomb's deadly efficiency as a surprise weapon.[3] 'Fear of such surprise violation of pledged word would surely break down any confidence in the pledged word of rival countries developing atomic energy if the treaty obligations and faith of the nations are the only assurance upon which to rely.'[3]

The First Report of the Atomic Energy Commission to the Security Council recommended[4] that there should be set up a strong and comprehensive international system of control and inspection aimed at attaining the objectives set forth in the Commission's terms of reference.[5] This system should be set up by a treaty which should become operative only when those Members of the United Nations necessary to assure its success have bound themselves to accept and support it.[6] One of the provisions in the treaty would be the prohibition of the manufacture, possession, and use of atomic weapons by all nations parties thereto and by all persons under their jurisdiction.[7] The Atomic Energy Commission found[8] that a treaty containing a prohibition to this effect, if standing alone, would fail 'to ensure' the use of atomic energy 'only for peaceful purposes' and to provide 'for effective safeguards by way of inspection and other means to protect complying states against the hazards of violations and evasions'. The

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[1] United Nations Document AEC/C.2/3, 31 July 1946, p. 3.

[2] Ibid., p. 4.

[3] *A Report on the International Control of Atomic Energy*, U.S. Department of State Publication 2498 (1946), p. 4.

[4] United Nations Document AEC/18/Rev.1, 3 January 1947, Part III, Recommendation 1.

[5] *Supra*, pp. 2–3.

[6] United Nations Document AEC/18/Rev.1, 3 January 1947, Part III, Recommendation 2.

[7] Ibid., Recommendation 3 (*c*).

[8] Ibid., Part II C, General Finding 6.

Board of Consultants mentioned above[1] had reached the conclusion that there is also no prospect of security against atomic warfare 'in a system of international agreements to outlaw such weapons controlled *only* by a system which relies on inspection and similar police-like methods'.[2] They believed that every stage in the activity leading from raw materials to weapon needs some sort of control, and that 'at no single point can *external* control of an operation be sufficiently reliable to be an adequate sole safeguard'. The Consultants expressed their belief that 'inspection can be effective only if it is supplemented by other steps to reduce its scope to manageable proportions, to limit the things that need to be inspected'.[3] There must be not only inspection but other forms of control as well. What would amount to an effective system of control and inspection can be answered only in terms of specific measures related to the methods and stages used in the production of fissionable material and atomic energy. A short comment on the latter may therefore be useful at this point in the discussion.

IV. *Production of nuclear energy*[4]

Until the discovery of atomic energy, the energy which man had learned to control derived almost exclusively (except for water, wind, and tidal power) from chemical reactions. For practical purposes, chemical combustion was the main source of energy. This energy is the product of the rearrangement of electrons at the periphery of atoms and results from a change in their chemical structure, that is, a regrouping of the atoms in chemical compounds. Each of the approximately six hundred known kinds of atoms (of which all matter is composed) consists of a light weight cloud of electrons at the centre of which is a very small, compact, and heavy core, called the nucleus. In the process of chemical combustion this nucleus is not disturbed; only the electrons at the periphery of the atom undergo rearrangement.

Atomic energy (or, more properly, nuclear energy) is the energy which results from rearrangements in the structure of the atom core or nucleus itself. The forces which hold the nucleus together are very strong, and the energy released when nuclei are rearranged, as in the fission process, is very great as compared with the energy from chemical reactions. In quantities useful for peace or war atomic energy comes only from a nuclear chain reaction, in which fissionable nuclei are split with the release of energy and of particles which cause fission of additional nuclei; this, like fire, is self-propagating and continues in ever-increasing sequence. In the explosion of an atomic bomb there is an uncontrolled chain reaction of this kind.

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[1] *Supra*, p. 10, n. 3.

[2] Op. cit., U.S. Department of State Publication 2498 (1946), p. 5.

[3] Ibid., p. 8.

[4] See *The International Control of Atomic Energy: Scientific Information transmitted to the United Nations Atomic Energy Commission*, U.S. Department of State Publication 2661 (1946), volumes 1–6; *A Report on the International Control of Atomic Energy*, U.S. Department of State Publication 2498 (1946), chapter 1; *Scientific and Technical Aspects of the Control of Atomic Energy*, United Nations Department of Public Information (1946); Smyth, *A General Account of the Development of Methods of Using Atomic Energy for Military Purposes under the Auspices of the United States Government* (1945).

Only one material found in nature in appreciable quantities has the property of 'nuclear inflammability'. Two other nuclear fuels capable of self-sustaining nuclear chain reactions can be created by processes which involve the one which occurs in nature. The nuclear fuel which is found in nature is one of the varieties (or isotopes) of the element uranium, Uranium 235 (U235). This may be 'burned' slowly to create atomic energy in a structure called a primary reactor or pile in which the chain reaction is controlled. Uranium as it occurs in nature is a mixture of three isotopes: U238, which is about 99·3 per cent. of the total of all naturally occurring uranium; U235, about 0·7 per cent.; and U234, present only in traces. U235 may be separated from U238 only by an exacting and difficult process requiring large and elaborate installations commonly called isotope separation plants.

The two nuclear fuels which may be created by processing are Plutonium 239 (Pu239) and Uranium (U233). This processing involves the use of U238 and U235 to produce Pu239, or the use of the metallic element thorium and U235 to produce U233. The production of significant quantities of Pu239 and U233 in this way requires several large installations comprising chemical extraction plants as well as reactors.

There are two critical factors relevant to any system of international control of atomic energy production. In the first place, the substances uranium and thorium play a unique role in the domain of atomic energy, since, so far as is known, these are the only materials from which nuclear fuel or the production of atomic energy on a practical scale can be obtained. Secondly, there is an intimate relationship between the activities required in the production of atomic energy for peaceful purposes and those leading to the production of atomic weapons; most of the stages which are needed for the former are also needed for the latter. This fact precludes any reliance upon inspection as the primary safeguard against violations of a convention prohibiting the manufacture of atomic weapons. On the other hand, the fact that, in large-scale production of fissionable materials, one element, uranium, is absolutely indispensable affords a starting-point for discussion of an adequate system of control.

V. *Types of control*

There must be safeguards against 'the hazards of violations and evasions' of the provisions of a treaty prohibiting the manufacture and use of atomic weapons. Inspection by an international inspectorate of national activities in the field of atomic energy would not by itself be a sufficient safeguard.[1] There must also be other forms of international controls exercised over such national activities if the safeguards are to be adequate. The types of controls or safeguards specifically mentioned in the First Report of the Atomic Energy Commission[2] as appropriate to various stages of atomic energy production are accounting for materials, inspection, supervision, management, and licensing.

Accounting for materials means the systematic measurement and reporting (to an international authority) of quantities of given materials entering and leaving an establishment or installation, in process, or in storage.[3] This would normally be accompanied by sampling, weighing, assaying, and analysis of materials, and auditing carried out by the international authority to ensure conformity between the accounts and the facts.

Inspection would be scrutiny of national activities by an international inspectorate with a view to detecting evasions or violations of methods of operation prescribed by the treaty establishing a system of control or by the authority acting under the treaty.[3] It would include observation of points of ingress to and egress from facilities producing or utilizing nuclear fuel to ensure that materials and supplies are flowing in the prescribed manner without illegal diversion, observation of the activities within establishments and installations, and measures (such as the making of surveys) taken to guard against clandestine activities carried on by nations or persons in contravention of the treaty.[3] An international inspectorate would have to have unrestricted access to all equipment and all phases of the operations and, in the case of refineries and plants, the right to require that they be shut down for purposes of clean-up and accounting at an appropriate time.

Supervision of national activities by an international authority would involve the continuous association of international officials in day-to-day operations, together with authority to require that the management comply with conditions prescribed by the international authority with a view to facilitating the execution of measures of control.[3] For example, it might include the right to require that plants be designed and constructed in such a manner as to hinder diversion of materials.

Management of a mine plant would involve direct power and authority being vested in an international authority over day-to-day decisions governing the operations themselves.[3]

Licensing is a type of safeguard in which the degree of control is determined by the licensing agreement between the international authority and the government or agency concerned.[1] A licence would be granted by the international authority to a national government or agency allowing the latter to conduct in its territory certain activities under specified conditions. The conditions might include obligations to account and report to the international authority, inspection or supervision by international officials, and the building of facilities in conformity with designs approved by the authority. Similar controls could be imposed under an agreement leasing an establishment or installation from the international control authority to a national government or through a management contract entered into between them in respect of a nationally-owned plant.

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[1] *Supra*, p. 11.

[2] United Nations Document AEC/18/Rev.1, 3 January 1947, Part V, chapter 1, pp. 53–7.

[3] Ibid., p. 55.

VI. *Powers of an international authority*

One of the conclusions in the First Report of the Atomic Energy Commission[2] was that an effective system for the control of atomic energy must be administered and operated by an international authority, within the United Nations,[3] possessing adequate powers and properly staffed, organized, and equipped for the purpose. If national governments are to continue to engage in the production and development of atomic energy, the powers with which an international authority is to be vested must enable it to exercise over those national activities the controls which will provide effective safeguards.

The Second Report of the Atomic Energy Commission adopted and sought to give expression to certain basic principles deemed essential to international security.[4] One of these principles is that decisions concerning the production and use of atomic energy should not be left in the hands of individual nations.[5] The peaceful development and application of atomic energy will involve a number of large-scale facilities and dangerously large quantities of nuclear fuel. Controls effectively preventing diversion of source materials and nuclear fuel at or between stages in the production of atomic energy would not prevent a nation with sources of uranium from gaining, in the course of legitimate activities, superiority over other nations in the quantity of nuclear fuel readily available to it and in the number of facilities involving nuclear fuel in operation in its territory.[1] By clandestine activities or the seizure of facilities operated or licensed by the international authority, a nation in such a superior position might be able to produce atomic weapons before international action could be taken to correct its violation of the control system. If the right to decide upon the number and size of production facilities and facilities using nuclear fuel, and upon the size of stockpiles of source materials and nuclear fuel situated in their territory, were left to nations, the control measures contemplated in the First Report of the Commission would not, if applied alone, form an effective system. Consequently, the Second Report of the Commission recommends that there should be more than international controls to prevent illegal diversion of source materials and nuclear fuel in the course of national activities. There should be ownership by an international control authority of all source materials and all nuclear fuel,[2] and ownership, management, and operation by the authority of all dangerous facilities.[3] In addition, the Commission's recommendations contemplate the licensing and regulating by the authority of non-dangerous activities carried on and facilities operated by nations subject to safeguards (such as international guards, accounting and supervision)[4] and inspection.[5]

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[1] United Nations Document AEC/18/Rev.1, 3 January 1947, Part V, chapter 1, pp. 55–6.

[2] Ibid., Part II C, General Finding 5.

[3] On 14 December 1946 the General Assembly unanimously adopted a Resolution on the Principles governing the General Regulation and Reduction of Armaments, in which it recommended that there should be established 'within the framework of the Security Council, which bears the primary responsibility for the maintenance of international peace and security', an international system of control and inspection, created by a convention or conventions, 'these conventions to include the prohibition of atomic and all other major weapons adaptable now and in the future to mass destruction and the control of atomic energy to the extent necessary to ensure its use only for peaceful purposes'. The resolution provided that the international system would operate 'through special organs, which organs shall derive their powers and status from the convention or conventions under which they are established'. *Resolutions adopted by the General Assembly during the Second Part of its First Session*, Document A/64/Add.1, 31 January 1947, Resolution 41 (I), sections 4 and 6, p. 65.

[4] United Nations Document AEC/26, 8 September 1947, pp. 1–2.

[5] Ibid., p. 1.

Certain other functions of the international authority would supplement these far-reaching powers. The authority would fix, within limits fairly precisely defined in the treaty establishing the control system, quotas for the mining of source materials in national territories.[6] It would enjoy the exclusive right to engage in research in the field of atomic explosives and weapons.[7] It would conduct research looking to the beneficial uses of atomic energy, and national governments and their nationals would also be free to do this—and would be encouraged and assisted by the international authority—provided they did not do so in a manner potentially dangerous to international security.[7]

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[1] United Nations Document AEC/26, 8 September 1947, p. 14.

[2] Ibid., Part II, chapters 3 and 5.

[3] Ibid., chapters 4 and 5. For the purposes of the Report, 'dangerous' activities or facilities are those which are of military significance in the production of atomic weapons. The word 'dangerous' is used in the sense of potentially dangerous to world security. (Ibid., p. 71.) In determining from time to time what are dangerous activities and dangerous facilities, the international authority would take into account (*inter alia*) the quantity and quality of materials involved in each case; the possibility of diversion; the ease with which the materials could be used or converted to produce atomic weapons; the total supply and distribution of such materials in existence; the design and operating characteristics of the facilities involved; the ease of altering those facilities; and possible combinations with other facilities. (Ibid., pp. 71–2.)

[4] Ibid., chapters 3, 4, and 5.

[5] Ibid., chapter 6.

[6] Ibid., chapter 3, Specific Proposal X, p. 38.

[7] Ibid., chapter 2.

The majority of the Commission concluded[1] that the specific proposals of the Second Report which define the functions and powers of an international authority, taken together with the General Findings and Recommendations of the First Report,[2] provide the essential basis for the establishment of an effective system of control.

VII. *International ownership*

Effective control of atomic energy depends upon effective control of the production and use of uranium, thorium, and their fissionable derivatives. Appropriate mechanisms of control to prevent their unauthorized diversion or clandestine production and use must be applied through the various stages of the processes from the time the uranium ores are severed from the ground to the time they become nuclear fuel and are used to produce atomic energy.[3]

The logical starting-point of a system of control is the source of the two key substances, uranium and thorium, which are the only raw materials from which the nuclear fuel required for the production of atomic energy can be obtained. Without control over these raw materials, any other controls which might be applied in the various processes of atomic energy production would be inadequate, because of the uncertainty as to whether or not the international control authority had knowledge of the disposition of all raw materials.[4]

The Second Report of the Atomic Energy Commission recommends[5] comprehensive international control of the flow of source materials from the first point where they are capable of being diverted to purposes dangerous to international security. This control would cover decisions on:

(i) mining quotas, the quantities in which and the rate at which uranium and thorium are to be separated from their place in nature;
(ii) the stockpiling and transport of such source materials;
(iii) the time and place of processing of source materials (including decisions on the size, use, and disposition of working stocks and stocks in transit);
(iv) the production, stockpiling, and distribution of nuclear fuels;
(v) the distribution (between nations) and utilization of dangerous facilities producing or using nuclear fuel.

The majority of the Atomic Energy Commission believe that the international authority must be given indisputable control over the disposition of source materials promptly after their separation from their place in nature.[1] It must also be given the power to make and carry out, in fulfilment of principles set out in the treaty, decisions determining the number of facilities involving nuclear fuel which are to be permitted to operate in each nation and their utilization.[2] It must have authority to regulate the production, distribution, and stockpiling of nuclear fuel.[3]

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[1] United Nations Document AEC/26, 8 September 1947, Part II, chapter 2, p. 2.

[2] United Nations Document AEC/18/Rev.1, 3 January 1947, Parts II C and III.

[3] Ibid., Part II C, General Finding 2.

[4] *Second Report of the Atomic Energy Commission to the Security Council* (Document AEC/26, 8 September 1947), pp. 30–1.

[5] Ibid., pp. 19, 32–3.

The Commission reached the conclusion that to confer upon the authority specific powers, rights, and duties in respect of source materials, facilities, and nuclear fuel owned by nations or persons might frequently give rise to doubts and controversies about the competence of the authority to make decisions or to take action essential to the effectiveness of the control system.[4] Claims founded on ownership might be made by nations or persons to prevent or restrict action by the international authority, and settlement of such differences would cause delay.[4] The Second Report of the Commission accordingly recommends that the international authority should be the sole owner of all source materials after severance (whether in raw material, concentrated, or other form) of all nuclear fuel, and of all dangerous facilities capable of producing, processing, or utilizing nuclear fuel.[5]

The international authority would, under the Commission's proposals,[6] acquire ownership of source material, for a fair price to be agreed, at the time it is removed from its place of deposit in nature, or, in the case of source material containing other important or commercially valuable constituents, from the time those constituents have been extracted, unless the authority is of the opinion that security considerations require that it should acquire ownership earlier.[7] Security does not necessarily require international ownership of source materials still in the ground, but there must be effective international control over actual mining operations, which would be carried out in accordance with a quota assigned and under a licence issued by the authority to the nation concerned.[8] The licence would require reports on mining and milling activities and authorize the international authority to make inspections, verify accountings, maintain guards to prevent diversion of source materials, and require the adoption of operating procedures facilitating accounting and hindering diversion.[1]

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[1] United Nations Document AEC/26, 8 September 1947, p. 33.

[2] Ibid., pp. 37–9, 50.

[3] Ibid., p. 50.

[4] Ibid., pp. 19–20, 33, 50.

[5] Ibid., pp. 21, 36, 43, 45, 51. At the thirteenth meeting of the Atomic Energy Commission on 10 September 1947 the representative of the United Kingdom stated that, while the Government of the United Kingdom accept the principle that the international control authority should be able to exercise some of the prerogatives of ownership, they believe that more study should be given to the implications of vesting ownership itself in the authority. In addition to the particular rights, normally associated with ownership, which the authority would have to be given, there are residual rights and, presumably, responsibilities deriving from ownership which are not fully considered in the Second Report of the Commission: Document AEC/P.V.13, 10 September 1947, p. 121.

[6] *Second Report*, pp. 33–4, 36, 39.

[7] Ibid., p. 36.

[8] *First Report*, Part II C, General Finding 2; *Second Report*, Part II, chapter 3, Specific Proposals IX and X, pp. 37–9.

In recommending this novel concept of international ownership in order that an international authority shall have the undoubted right of decision with regard to the disposition of source materials and nuclear fuels, and the operation of dangerous facilities, the Atomic Energy Commission realized that nations cannot be expected to agree to give unlimited discretionary powers to an international authority.[2] The Second Report accordingly sets out in some detail suggested provisions to be included in the treaty establishing the authority, which would circumscribe the exercise of the powers deriving from ownership. The Commission's scheme contemplates that the authority would be very closely controlled by the terms of the treaty with respect to those decisions which normally are incident to ownership, namely, those involving the rights of use and disposition. This may be expressed by saying that the authority would hold all dangerous materials and facilities in trust for the participating states and would be responsible for carrying out the provisions of the treaty with regard to their use and disposition. The rights and duties incident to ownership by the international authority would be in substance the same rights and duties incident to ownership of trust property by a corporate trustee for the purposes of a public trust under English law. Ownership by the authority of source materials and nuclear fuel would, for example, include the exclusive right to remove or lease them, the right to use them and to produce atomic energy from them, and the same rights for all products formed from them.[3] No disposition of source materials could be made without the permission of the authority. On the other hand, the authority would not be permitted to sell source materials or nuclear fuel, but could lease them to nations for authorized non-dangerous uses.[4]

Likewise, ownership by the international authority of dangerous facilities would include the right to make decisions regarding their allocation as between nations, their construction, and their operation, but these decisions would be made in accordance with the terms of the treaty.[3] The location and type of such dangerous facilities within a nation would be decided by agreement between the international authority and the nation concerned.[3] Ownership by the international authority of facilities would include rights of possession, operation, and disposition, subject to the terms of the treaty. The useful and non-dangerous products of these facilities would be made available, under fair and equitable arrangements, to the nations participating in the control system.[5] The authority would not be permitted to sell dangerous facilities, but it could license national operation of facilities utilizing nuclear fuel if there is no danger to security, subject to safeguards, such as a requirement that records be kept or that specified operating procedures be followed.[1]

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[1] *Second Report*, pp. 37–8.
[2] Ibid., pp. 21–2.
[3] Ibid., p. 21.
[4] Ibid., pp. 21, 52.
[5] Ibid., p. 21. Presumably also all the rights in inventions or processes, advancing the peaceful application of atomic energy or benefiting other branches of science, discovered by employees of

VIII. *Explorations, surveys, and inspections*

The First Report of the Atomic Energy Commission contemplated that the international control authority, if it were set up, would need very wide powers of inspection and search if the system of control were to be effective.[2] The principal categories of searches and inspections in which the authority would engage under the scheme outlined in the Commission's Reports are:

(i) geological and mineralogical surveys and explorations to verify the information which nations would be required by the treaty to report concerning source materials in their territory and to discover new deposits and so obtain complete information of world supplies of source materials;[3]

(ii) inspection of known activities lawfully carried on by nations under licence from the international authority, to assure their devotion to peaceful purposes and to prevent illicit diversion of source materials and nuclear fuel;[3]

(iii) inspections and surveys to detect clandestine activities carried on by nations or persons in contravention of the treaty establishing the control system.[3]

Such international inspection and search would require substantial concessions in the traditional jurisdiction of nations. For example, surveys and explorations undertaken by the international authority to discover world supplies of source materials would probably cover a substantial portion of the territory of particular nations and would include private as well as public lands.[4] Military or other restricted areas could not be exempt.[5] Similarly, broad powers would be necessary to allow the conduct

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the international authority engaged in its research activities (*supra*, p. 15), would be vested in the authority in trust for all participating nations, to which full information would be given in accordance with the principle that 'there should be no secrecy concerning scientific and technical information on atomic energy': *Second Report*, Part II, Chapter 2, Specific Proposal VIII, p. 29. This principle would also apply to the results of research conducted by nations and persons, but provision would have to be made for protection of the rights of the inventor if the discovery is to be communicated through the international authority to all participating states, as is suggested in the *Second Report*: ibid.

[1] Ibid., pp. 21, 52.

[2] United Nations Document AEC/18/Rev.1, 3 January 1947, Part III, Recommendation 3 (*d*).

[3] *Second Report of the Atomic Energy Commission to the Security Council*, Document AEC/26, 8 September 1947, p. 58.

[4] Ibid., p. 59.

[5] Ibid., Part II, chapter 6, Specific Proposal XX, p. 70.

of inspections and surveys to detect clandestine activities, and these powers would include authority, in circumstances where reasonable grounds for suspicion exist and where prescribed procedures are followed, for the authority's inspectors to visit any area, mine, facility, or place of whatever description within the territory of participating nations.[1]

The duly accredited personnel of the international authority conducting inspections, surveys, and explorations authorized by the treaty must be accorded, by virtue of the treaty, special rights and privileges of entry into, movement within, and egress from the territory of nations.[2] They must be granted facilities for speedy travel and communication.[3] United Nations *laissez-passer* must be accepted as their valid travel documents.[4] Where visas are required the international authority's applications therefor must be dealt with promptly by the nations concerned and may be validly denied only in extraordinary circumstances and upon grounds specified in the treaty.[5] It is not contemplated that there should be any right of secret entry into national territories, or that nations would have no right to prevent entry of an inspector if valid cause specified in the treaty existed.[6]

The Second Report of the Atomic Energy Commission also recognizes that there must be limitations, chiefly in the form of procedural requirements, upon these powers of inspection and search to protect nations from unwarranted invasions of their privacy.[6]

Inspections, surveys, and explorations must be conducted on behalf of the international authority only for purposes related to atomic energy, and with regard for domestic laws and traditions relating to personal privacy and private property to the fullest extent consistent with the effective discharge of the authority's duties under the treaty.[7] The authority and its officials must not disclose confidential or private information unrelated to atomic energy which they may acquire in the course of their work.[7] The authority should be liable to compensate for damage caused by its employees in the course of inspections, surveys, and explorations.[7] The officials of the authority should, however, be immune from personal arrest or detention and from suit or prosecution in respect of acts done or words spoken in the course of the performance of their duties, subject to the right and duty of the authority to waive such immunity whenever this may be done without prejudicing the interests of the authority.[1]

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[1] *Second Report of the Atomic Energy Commission to the Security Council*, Document AEC/26, 8 September 1947, Part II, chapter 6, Specific Proposal XX, p. 59.

[2] Ibid., Specific Proposal III, p. 63.

[3] Ibid. Cf. section 22 (*d*) and (*f*) of the General Convention on Privileges and Immunities of the United Nations: *Resolutions adopted by the General Assembly during the First Part of its First Session*, Document A/64, 1 July, 1946, p. 27.

[4] *Second Report of the Atomic Energy Commission to the Security Council*, Document AEC/26, 8 September 1947, Part II, chapter 6, Specific Proposal III, p. 63. Cf. Art. VII of the General Convention on Privileges and Immunities of the United Nations: *Resolutions adopted by the General Assembly during the First Part of its First Sessions*, Document A/64, 1 July 1946, p. 27.

[5] *Second Report of the Atomic Energy Commission to the Security Council*, Document AEC/26, 8 September 1947, Part II, chapter 6, Specific Proposal III, p. 63.

[6] Ibid., p. 60.

[7] Ibid., p. 64.

Before conducting any survey or exploration authorized by the treaty, the authority should be required to give notice to the nation concerned.[2] The nation concerned should have the right, in the case of all surveys and explorations, to send a representative (or a number of representatives, if the authority agrees or so requests) to accompany and assist the surveying or exploring party.[2]

Activities, mines, facilities, or places could be inspected, as a matter of routine, without prior notice to the nation affected and without affording it an opportunity to send a representative in certain cases, for example, those managed, licensed, or leased by the authority.[2] In other cases, inspections, like surveys and explorations, should, as a general rule, be only after previous notice and subject to opportunity to the nation affected to be represented.[2]

In exceptional circumstances, however, the object of inspection might be defeated if advance notice were given to the nation concerned, and in such a case it has been suggested[2] that inspection without notice should be authorized by a warrant or other special authorization[3] of an independent international court, body, or official of competent jurisdiction as agreed in the treaty. The Commission has also recommended[4] that inspections and surveys for clandestine activities in private or restricted places in national territory should be conducted only with the consent of the nation concerned, or upon authorization granted in accordance with domestic law (for example, a warrant issued by a competent court or official), or under authority of a competent international court or body independent of the authority.[5] Normally, but not necessarily, authority should be sought in such cases, in the first instance, from the appropriate domestic source, but a denial or undue delay by the latter would not prejudice the right of the authority to apply to the agreed international court or body.[6]

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[1] Compare sections 18 (*a*), 20, 22 (*a*), (*b*), and (*c*), and 23 of the General Convention on the Privileges and Immunities of the United Nations: *Resolutions adopted by the General Assembly during the First Part of its First Session*, Document A/64, 1 July 1946, pp. 26–7.

[2] *Second Report of the Atomic Energy Commission to the Security Council*, Document AEC/26, 8 September 1946, Part II, chapter 6, Specific Proposal IV, pp. 64–5.

[3] See *infra*, n. 5.

[4] *Second Report*, Part II, chapter 6, Specific Proposal IX, p. 67.

[5] The Atomic Energy Commission suggests that the warrant or equivalent authorization shall describe the premises or areas authorized to be entered and the facilities or other property authorized to be inspected or the areas authorized to be surveyed. It may specify the manner in which the inspections or surveys shall be conducted consistently with the treaty. In the case of inspections, it may authorize the agency to take custody of property which is used or possessed by persons or nations in violation of the treaty. Ibid., Specific Proposal XIV, p. 68.

[6] Ibid., Specific Proposal XI, p. 67.

The treaty would also have to confer upon the international authority the right to make aerial surveys,[1] which are essential in some circumstances to the detection of clandestine operations in areas difficult of access or sparsely populated.[2] The provisions would be similar to those to be made in respect of ground surveys. Limitations which might be appropriate to aerial surveys in ordinary circumstances would include a requirement of previous notice to the nation over the territory of which survey flights were to be made.[3] The nation should also have the right to inspect the aircraft to be used and should be given an opportunity to send an observer.[3] Copies of aerial photographs taken during survey flights and of reports describing the results of the survey should ordinarily be furnished to the nation concerned.[3]

IX. *Establishment, operation, and enforcement of the control system*

It has been suggested[4] that it would be incompatible with the sovereignty of Member States of the United Nations to establish an international control authority with broad functions and powers over national activities. It is true that a system under which ownership of source materials, nuclear fuel, and dangerous facilities existing on national territory is vested in an international authority with powers of licensing, regulation, and inspection of national activities in the field of atomic energy contemplates 'a degree of world supervision unprecedented in the history of relations between sovereign states'[5] and would involve a great modification of traditional attitudes towards sovereignty. Nevertheless the adoption of international controls and sanctions, provided they are voluntarily accepted by the nations to be subject to them, cannot be held incompatible with the sovereignty of any state.[6] Every state may limit its sovereignty when it voluntarily concludes an international convention, without ceasing to remain fundamentally a sovereign state.[6] Sometimes such conventions restrict the liberty of sovereign states very considerably, but the sovereignty of those states is not necessarily thereby impaired in principle. Freedom to enter into such international arrangements is inherent in the very concept of national sovereignty. Restrictions on national sovereignty 'cannot be too great when they are indispensable to world security in the utilisation of new reserves of energy offered to the world'.[1]

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[1] *Second Report*, Part II, chapter 6, Specific Proposals XV, XVI, XVII, XVIII, p. 69.

[2] *First Report of the Atomic Energy Commission to the Security Council*, Document AEC/18/Rev.1, 3 January 1947, Part V, chapter 6, Finding 5.

[3] *Second Report*, Part II, chapter 6, Specific Proposal XV, p. 69.

[4] Representative of the U.S.S.R., Committee 2, 24 July 1946, Document AEC/WC/3, p. 4.

[5] Representative of the United Kingdom, Atomic Energy Commission, 10 September 1947, Document AEC/P.V.13, p. 118.

[6] Representative of the Netherlands, Committee 2, 26 July 1946, Document AEC/C.2/3, p. 4.

An effective system for the control of atomic energy 'must be international, and must be established by an enforceable multilateral treaty or convention'.[2] The Atomic Energy Commission, by a majority vote,[3] could recommend to the Security Council the text of a treaty establishing a control system which, in its view, would be effective. The endorsement of such a draft by the Security Council would require seven affirmative votes, including those of the five permanent members, under paragraph 3 of Article 27 of the Charter.[4] Neither such action by the Commission and by the Council nor even the approval by the General Assembly of the draft treaty would make it binding upon Members of the United Nations. Each Member would be free to decide whether or not it wished to become a party to the control system established under the treaty.

The Atomic Energy Commission has recommended that the system of control and inspection should become operative only when those Members of the United Nations necessary to assure its success have bound themselves, by becoming parties to the treaty, to accept and support it.[5] Even then the system could not be put into immediate operation in its entirety. There would have to be transition to full international control by successive stages set forth in the treaty.[6]

The Commission has not yet made recommendations on the structure and organization of an international authority for the control of atomic energy.[7] The staff of the international authority must, of course, be international officials,[8] but a more difficult question is whether the directorate of the authority should consist of one person or of a body of persons and, if the latter, whether such persons should be the representatives of states or persons selected solely on the basis of individual merit and competence. The most suitable arrangement might be an executive board composed of the representatives of fifteen states (including the states permanently represented on the Security Council and states chosen from among the principal producers of source materials and the principal consumers of nuclear fuel), and a director or manager responsible to the executive board.

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[1] Representative of Belgium, Atomic Energy Commission, 11 September 1947, Document AEC/P.V.14, p. 51.

[2] *First Report of the Atomic Energy Commission to the Security Council*, Document AEC/18/Rev.1, 3 January 1947, Part II C, General Finding 5.

[3] Provisional Rules of Procedure of the Atomic Energy Commission, Rule 33.

[4] Chapter V, Art. 27: '. . . 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.'

[5] *First Report of the Atomic Energy Commission to the Security Council*, Document AEC/18/Rev.1, 3 January 1947, Part III, Recommendation 2. The writer has heard it suggested that the treaty should provide that, when it has entered into force, the failure of any of the remaining states of the world to become parties to the control system within a stated time or the withdrawal of any state from the system after it has joined shall be deemed to constitute a threat to the peace entitling the Security Council to take action under Chapter VII of the Charter.

[6] Ibid., Recommendation 5.

[7] *Second Report of the Atomic Energy Commission to the Security Council*, Document AEC/26, 8 September 1946, p. 7.

[8] See ibid., Part II, chapter 6, Specific Proposal I, p. 62.

It is possible that the General Assembly of the United Nations might be given important functions in relation to the organization of the international authority. It might be given, under the treaty, the power to elect and remove the members (or the non-permanent members) of the executive board of the authority, if the structure of the latter included such a body. It could examine and approve the budget proposed annually by the authority for itself. The authority should be required to report periodically to the Assembly on the operation of the control system. The Assembly might also be given the right to propose amendments to the treaty setting up the control system, although such amendments could, of course, enter into force only upon the acceptance of them by the states participating in the system, in accordance with whatever provision for amendment is contained in the treaty.[1] If the General Assembly were given these or similar powers and duties in respect of the international authority, it would no doubt find it convenient to establish a committee to deal exclusively with atomic energy matters.[2]

There are, however, factors which may lead to the conclusion that the above functions might be more suitably performed by a special annual conference of all states parties to the treaty establishing international control. For example, those states might not be identical with the membership of the United Nations.

The Commission has also recommended[3] that the rule of unanimity of the permanent members which in certain circumstances exists in the

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[1] Compare Charter of the United Nations, Chapter XVIII, Art. 109: '. . . 2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all the permanent members of the Security Council.'

It is contemplated that the treaty establishing the control system would contain a statement of the policies and principles within the limits of which the international authority would make its decisions. The treaty might even lay down the initial decisions on some major questions of policy, such as the location and size of stockpiles, production quotas for source materials, and distribution quotas for nuclear fuel. It might therefore be appropriate to make provision in the treaty for altering these policies, principles, and initial decisions in the light of experience and of technical developments, without the necessity of ratification by a given number of states of a formal amendment of the treaty. It could be provided that such an alteration, if proposed by a majority of the participating states or by the executive board of the international authority, would become binding upon the authority and upon all participating states, when two-thirds of the latter had given their approval to it, for example, by voting in favour of it at a conference of participating states.

[2] Rules of the General Assembly (Document A/482, 14 November 1947), Rule 88: The General Assembly may set up such committees as it deems necessary for the performance of its functions.

[3] *First Report of the Atomic Energy Commission to the Security Council*, Document AEC/18/Rev.1, 3 January 1947, Part III, Recommendation 3 (*c*).

Security Council should have no relation to the work of the international control authority. No government should possess any right of veto over the fulfilment by the international control agency of the obligations imposed upon it by the treaty, nor should any government have the power, through the exercise of a veto or otherwise, to obstruct the course of control or inspection.[1] In other words, once the treaty establishing the control system has entered into force, no veto shall apply to the decisions of the international authority relating to control (licensing, regulation, &c.), inspection, surveys, and so on.[2]

Apart from the voting procedure by which decisions are to be reached by the international authority, it has been suggested[3] that most of its decisions, such as those on administrative matters, should be final. Some of its decisions (including findings of violations and decisions on sanctions for violations not constituting threats to the peace) might be subject to review, perhaps by a board established for this purpose or, where legal questions are involved, by an international court. For example, the refusal by the authority to grant a licence applied for by a nation, or the suspension or revocation of a licence granted, should be subject to review by an international court on the application of the nation affected.[4] Similarly, a nation should have the right to appeal to an international body against what it may consider to be an improper use by the international control authority of its power to conduct surveys and explorations in areas reported not to contain source material.[5]

Findings by the authority with respect to serious violations of the treaty (such as wilful and persistent refusal to submit to inspection or to abide by determinations, regulations or decisions of the authority) should be accepted as final by the Security Council. The Charter of the United Nations confers on the Security Council the primary responsibility for the maintenance of peace and security.[6] Many of the important features of an effective international system of control of atomic energy would be intimately associated with the maintenance of international peace and security. With respect to these features, there would have to be a close relationship between the authority and the Security Council. The latter should have jurisdiction over serious violations affecting the maintenance of international peace and security. In the event of a finding by the international authority of an occurrence within the area of its jurisdiction appearing to it to constitute a threat to the peace, breach of the peace, or act of aggression, such occurrence should be immediately notified to the Security Council.[1]

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[1] *First Report*, Part III, Recommendation 3 (*c*).

[2] Although there is considerable difference between the recommendations in the Reports of the Atomic Energy Commission and the views which the Government of the Soviet Union have expressed on the types and extent of control and inspection (see, for example, Documents S/283, 18 February 1947, paragraphs 1 and 3, p. 1; AEC/C.2/71, 11 August 1947, p. 3; and AEC/C.2/109, 7 September 1947, p. 3), there appears to be no divergence on the principle that the rule of unanimity in the voting procedure of the Security Council shall have no application to the decisions by the authority in the exercise of the agreed forms of control (as distinct from the imposing of sanctions against violators of the control system): *Journal of the United Nations*, No. 51, 6 December 1946, Supplement No. 1, p. 260; cf. Document S/283, 18 February 1947, paragraph 6, pp. 2–3.

[3] *Memorandum No. 3, submitted by the United States Representative on the Atomic Energy Commission, dealing with the Relations between the Atomic Development Authority and the Organs of the United Nations* (12 July 1946), Document AEC/WC/2, 17 July 1946, p. 36.

[4] *Second Report of the Atomic Energy Commission to the Security Council*, Document AEC/26, 8 September 1947, Part II, chapter 3, Specific Proposal IX (*e*), p. 38.

[5] Ibid., Specific Proposal III (*c*), pp. 35–6.

[6] Chapter V, Art. 24 (1), see *supra*, p. 5, n. 1.

The Atomic Energy Commission has recommended[2] that the judicial or other processes for determination of violations of the control system, and of punishments therefor should be swift and certain, and that there should be no legal right, by veto or otherwise, whereby a wilful violator of the terms of the treaty may be protected from the consequences of violation. Any control system would be ineffectual if, in the event of a breach of the controls committed by a signatory state, the operation of the enforcement provisions could be prevented by the negative vote of that state or some other state which has signed the treaty.[3] All parties to the treaty must have protection of a final and dependable character, and this protection requires international machinery which does not permit the offender to be protected by his own or another's negation of the exercise of the joint power which is essential to the security of all parties to the treaty.[4]

Under the Charter sanctions taken by the Security Council under Chapter VII against a state which violates or threatens to violate international peace and security are possible only with the concurrence of the five permanent members of the Security Council.[5] The United States delegation to the Atomic Energy Commission has suggested the voluntary relinquishment of the veto by the permanent members of the Security Council in so far as it would apply under the Charter to decisions of the Council on enforcement measures to be taken against a violator of the control system.[6] This voluntary relinquishment of the veto on questions relating to a specific weapon, previously outlawed by unanimous agreement because of its uniquely destructive character, would not, in the United States view,[1] involve any compromise of the principle of unanimity of the permanent members of the Security Council as applied to particular situations not foreseeable and therefore not susceptible of advance unanimous agreement.

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[1] *Memorandum No. 3, submitted by the United States Representative on the Atomic Energy Commission, dealing with the Relations between the Atomic Development Authority and the Organs of the United Nations* (12 July 1946), Document AEC/WC/2, 17 July 1946, p. 38.

[2] *First Report of the Atomic Energy Commission to the Security Council*, Document AEC/18/Rev.1, 3 January 1947, Part III, Recommendation 3 (*e*).

[3] At the San Francisco Conference at which the Charter was drafted most critics of the veto centred their arguments around its application to the pacific settlement of disputes (Chapter VI) and did not question the applicability of the veto power in relation to enforcement action under Chapter VII. See Koo, *Voting Procedures in International Political Organisations* (1947), p. 124.

[4] *Memorandum No. 3, submitted by the United States Representative on the Atomic Energy Commission, dealing with the Relations between the Atomic Development Authority and the Organs of the United Nations* (12 July 1946), Document AEC/WC/2, 17 July 1946, p. 39.

[5] Chapter V, Art. 27 (3), *supra*, p. 23, n. 4.

[6] *Memorandum No. 3*, &c. The view of the Government of the Soviet Union is that all

Serious violations of the control system, those involving a threat to or breach of international peace and security, would be the concern of the Security Council, but the First Report of the Atomic Energy Commission observes[2] that a violation might be of so grave a character as to give rise to the inherent right of self-defence recognized in Article 51 of the Charter.[3] That Article provides as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

It is to be noted that this Article relates only to defence against 'armed attack', is permissive, allows either individual or collective action, and recognizes this only as an interim measure pending action by the Security Council.

It would seem insufficient and somewhat artificial merely to provide, as has been suggested,[4] in a treaty establishing an international system for the control of atomic energy that 'certain steps preliminary to' the actual dropping of an atomic bomb should be deemed to constitute 'armed attack' for the purposes of Article 51. It is submitted that there should be a provision in the treaty on the general lines of Article 51 of the Charter but differing from it in some material particulars. Instead of being confined to armed attack, the defensive action contemplated should be that called for by a serious violation of the control system found by the international authority. There would also have to be an obligation on the parties to the

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decisions on sanctions against violators shall be taken by the Security Council in accordance with Art. 27 of the Charter: United Nations Document AEC/C.2/109, 7 September 1947, p. 3; cf. Document S/283, 18 February 1947, paragraph 9, p. 3.

[1] *Memorandum No. 3*, at pp. 39–40.

[2] Part III, Recommendation 4.

[3] Compare Art. 4 of the draft convention prepared by the Legal Sub-Committee of the Committee on Atomic Energy of the Carnegie Endowment for International Peace (June 1946), and Arts. 3, 8, 9, 11, 12, and 20 of the Inter-American Treaty of Reciprocal Assistance (*United States Department of State Bulletin*, 17 (1947), pp. 565–7).

[4] *Memorandum No. 3, submitted by the United States Representative on the Atomic Energy Commission, dealing with the Relations between the Atomic Development Authority and the Organs of the United Nations* (12 July 1946), Document AEC/WC/2, 17 July 1946, p. 40.

treaty to take action in the event of a serious violation, not merely permission to do so; and the provision would have to require collective action on the part of all or a number of the parties.

The treaty would define or describe the serious violations (for example, the seizure of any plant, material, or other property owned or licensed by the authority) which, when found by the international authority, would call into application the duty of collective action. There would, however, have to be co-ordination and direction of this collective action which the treaty would oblige participants in the control system to take. Some authority would have to decide the form of this joint action appropriate to a particular case and direct the efforts of the nations concerned. It would be impossible to foresee and to define in the treaty the manner in which action should be taken in every case of a violation. If direction of the collective action by parties to the treaty is not to be entrusted to the Security Council—and it is contemplated as an interim measure pending action by the Security Council—the international authority itself should be given the power to direct such action.

If an international authority were set up, its task would be the administration of a system of control and the correction of abuses discovered in the operation of that system. If it found a violation, whether serious or minor, its duty would be to seek to restore the system to the secure state in which it existed before the violation was committed. In the case of a serious violation, collective action would be taken by the other parties to the treaty against the violator, under a provision on the lines discussed above. The Security Council, in fulfilment of its wider responsibility for international peace and security, would examine from that point of view all violations found and reported by the authority, and if the Council found that a violation threatened international peace and security, it could order action under Chapter VII of the Charter against the violator in protection of the wider interest of international peace and security. If the Council did that, then no doubt the action so taken would not only remove the threat to international peace and security but would at the same time do much to restore the system of control to its former effectiveness. In those circumstances action by the signatory states pursuant to their obligation of collective action would become unnecessary when the Security Council took action. Members of the United Nations would be bound by their Charter obligations to give effect to the Security Council's decision.[1] Any treaty provision requiring the signatories to take collective action against a state which had committed a serious violation would therefore lapse or be superseded because the Security Council was directing action under the

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[1] Chapter V, Art. 25: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

Charter in fulfilment of its wider responsibilities.[1] But if the Council found no threat to international peace and security or failed to take effective measures, then action taken by the signatories under the treaty would continue until the system was restored. It is submitted that, irrespective of any action which the Security Council may take with regard to a violation or evasion, the international authority itself should continue to employ all the means in its power to restore the situation.

Not only states which are participating in the control system, but also persons, natural and juridical, within the territory of a state party to the treaty, may act in a manner inconsistent with the controls set up under the system. National legislation, far-reaching and complex, would be required to adapt the legal system of a participating state to the new obligations by which it became bound under the treaty. The legal status of the international authority, its privileges and immunities and those of its personnel[2] would have to be the subject of legislation in participating states. International ownership of source materials after severance, of nuclear fuel, and of dangerous facilities would involve substantial changes in the local law. The Atomic Energy Commission has recommended that the treaty should include a provision that the participating nations will take legislative and administrative action to compel persons within their territories to submit to and to facilitate authorized inspections, surveys, and explorations by the international authority.[3]

Provisions of municipal law directed against persons engaging in activities which are the exclusive right of the international authority or are otherwise contrary to the control system would have to provide for jurisdiction in the local courts in respect of acts prohibited under the treaty, wherever committed by persons, natural and juridical, of whatever nationality, provided the accused is within the local jurisdiction at the time of trial. Article 3 of the draft international convention on the prohibition of the production and employment of weapons based on the use of atomic energy proposed by the representative of the Soviet Union on 19 June 1946[4] would oblige the contracting parties, within a period of six months from the entry into force of the convention, to pass legislation providing severe penalties for violators of the provisions of the convention. It might be necessary for such a provision in the convention to define the violations and specify the punitive measures to be the subject of such domestic legislation.

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[1] Charter of the United Nations, Chapter XVI, Art. 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[2] Cf. Arts. I, II, III, and V of the General Convention on Privileges and Immunities of the United Nations: *Resolutions adopted by the General Assembly during the First Part of its First Session*, Document A/64, 1 July 1946, pp. 25–6.

[3] *Second Report of the Atomic Energy Commission to the Security Council*, Document AEC/26, 8 September 1947, Part II, chapter 6, Specific Proposal XX, p. 70. Cf. section 5, Atomic Energy Act, 1946, 9 and 10 Geo. 6, c. 80.

[4] Atomic Energy Commission, *Official Records, No. 2*, p. 27.

The possibility of international action against individual violators was mentioned by the United States representative at the meeting of the Atomic Energy Commission on 14 June 1946,[1] at which the United States proposals for a system of control were first made: 'The United Nations can prescribe individual responsibility and punishment on the principle applied at Nuremberg by the Union of Soviet Socialist Republics, the United Kingdom, France, and the United States; a formula certain to benefit the world's future.'[2] By Article 2 of the draft convention proposed by the Soviet representative, mentioned above, the parties would 'declare that any violation of Article 1[3] of the present Convention is a most serious crime against humanity'. The First Report of the Atomic Energy Commission recommends[4] that the treaty establishing the control system should set forth 'such violations as shall constitute international crimes'. Neither the Soviet proposal nor the Commission's Report mentions the tribunal by which persons accused of these crimes would be tried, but it may be noted in this connexion that a draft convention on atomic energy control published unofficially in the United States in April 1946[5] contains the following provisions:

> '35. Any of the United Nations permanently represented in the Security Council may indict any individual before the United Nations Criminal Court for violation of [the prohibitions contained in the Convention] and that Court shall determine the penalty in accord with the law of the place where the act was committed, the law of the state of which the individual is a national, or the law of the indicting state whichever it deems most suitable.
>
> '36. An individual so indicted shall be surrendered to the custody of the United Nations Criminal Court by the state of asylum when requested by that Court.
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> '37. The organisation and procedure of the United Nations Criminal Court shall be that provided for the International Criminal Court under the convention of Geneva of November 16, 1937.'[6]

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[1] Atomic Energy Commission, *Official Records, No. 1.*

[2] Ibid., p. 5.

[3] Art. 1: 'The high contracting parties solemnly declare that they will forbid the production and use of weapons based upon the use of atomic energy, and for this purpose assume the following obligations:
(*a*) not to use atomic weapons in any circumstances whatsoever;
(*b*) to prohibit the production and storing of weapons based upon the use of atomic energy;
(*c*) to destroy, within a period of three months from the day of the entry into force of the present convention, all stocks of atomic energy weapons whether in a finished or unfinished condition.'

[4] Part III, Recommendation 3 (*e*).

[5] *Bulletin of the Atomic Scientists*, vol. i (1946), pp. 11–13.

[6] Convention for the Creation of an International Criminal Court, 16 November 1937, League of Nations Document C.547(1) M.384(1), 1937, V; Hudson, *International Legislation*, vol. vii (1935–7), No. 500, p. 878.

Apart from the question of international jurisdiction over individuals in respect of international crimes, there remains to be considered by the Atomic Energy Commission the relationship between the proposed international authority and the International Court of Justice. The International Court of Justice could establish a Special Chamber for cases between states relating to atomic energy control.[1] Under the Statute of the Court as now in force, the International Court would not be open to the international authority itself as a litigant,[2] but the General Assembly could empower the authority, if it were brought into relationship with the United Nations as a specialized agency,[3] to request the Court to give advisory opinions on any legal questions arising within the scope of the authority's activities,[4] including questions of interpretation or application of provisions of the treaty establishing the control system. The treaty should oblige the authority and states parties to it to accept such opinions as authoritative and binding.

It would seem desirable, if an international system of control is established, that the Statute of the International Court of Justice should be amended to give the Court wider jurisdiction over questions of international control of atomic energy. The Court should be able to give binding decisions, in litigation between the international authority and states parties to the treaty, on the interpretation of the treaty itself, and on questions relating to rules, orders, and licences issued by the authority. It should have jurisdiction to dispose finally of disputes (not otherwise settled) about compensation for property, facilities, and processes acquired by the authority[5] or arising out of acts or omissions by personnel of the authority in the course of their duties.[6] The Court should also be given the authority to issue warrants authorizing surveys and inspections to be made by employees of the authority in those cases, mentioned above,[7] in which authorization by an international court will be required. As suggested above, certain decisions of the authority might be made subject to judicial review and this could also be appropriately done by the International Court. Moreover, some decisions or actions by nations parties to the treaty should be reviewable by an international court at the instance of the international authority if it considers that its operation of the control system is adversely affected thereby. For example, the denial of a visa requested for an official of the international authority to enable him to carry out an inspection or search authorized by the treaty should be subject to review by an international court if the international authority considers that such denial was not properly founded on one of the grounds specified in the treaty.[1]

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[1] Statute of the International Court of Justice, Chapter I, Art. 26, para. 1; Rules of Court, Art. 24.

[2] Statute of the International Court of Justice, Chapter II, Art. 34, para. 1.

[3] Charter of the United Nations, Chapter IX, Art. 57, and Chapter X, Art. 53.

[4] Ibid., Chapter XIV, Art. 96: '. . . 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.'

[5] *Second Report of the Atomic Energy Commission to the Security Council*, Document AEC/26, 8 September 1947, Part II, chapter 3, Specific Proposal XII, p. 39.

[6] Ibid., chapter 6, Specific Proposal III (*d*), p. 64.

[7] *Supra*, p. 21.

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[1] *Second Report*, Part II, chapter 6, Specific Proposal II, p. 63.

THE TRUSTEESHIP SYSTEM

By H. DUNCAN HALL, M.A.

I

THE First World War produced the mandate system. The Second brought it to a standstill by destroying the system of international supervision on which it was based. All the mandated territories were involved in the war. Some of them, like Syria and Palestine, the South Sea Islands, Western Samoa, New Guinea, and Nauru, had experience of war at first hand. Some mandated territories were used as bases against other mandated territories. Palestine was used as a base against Vichy French forces and the Axis, which had begun to entrench itself in Syria. The Japanese mandated islands served as bases for attack on Nauru and New Guinea. In two other territories, South-West Africa and Tanganyika, where the German settlers had been allowed to remain or return, rebellion was plotted unsuccessfully against the mandatory power. In some of the mandates the continuity of the local mandate administration was never lost. Two of the Pacific mandates were overrun by Japan so that for a time they passed right out of the system. Three of the Middle East mandates—Syria, Lebanon, and Transjordan—became independent states and so ceased to be mandates, and this without any direct action by the League of Nations or the United Nations. They achieved independence by short cuts, very different from the regulated and leisurely process whereby Iraq became independent and joined the League as a Member State in 1932—a precedent which France cited in vain as the correct legal pattern to be followed in the case of Syria.

Of much greater interest from a legal point of view were the changes of 1945–7. These were the death of the League, intestate in the matter of mandates; the drawing up of the trusteeship provisions of the Charter; the delicate legal and political problems of switching over from the mandate to the trusteeship system; the negotiation of a whole new set of international instruments in the form of the United Nations trusteeship agreements; the setting in motion of the new United Nations machinery of international supervision over trust territories; the plan for the partition of Palestine and the Statute for Jerusalem. The array of new legal texts thus includes (in addition to this Statute) (1) the two trusteeship chapters of the United Nations Charter, with the parallel chapter on Non-Self-Governing Territories; (2) the ten new trust agreements for ten of the former League mandates (Tanganyika, Ruanda Urundi, French and British Cameroons, French and British Togoland, Western Samoa, New Guinea, Nauru, and the special Pacific Islands 'strategic area' agreement); (3) the colonial clauses (Art. 23 and Annex XI) of the Peace Treaty with Italy of 10 February 1947. To these should be added (4) the Statute of the Free Territory of Trieste which is in many ways related to the international trusteeship system.

The interpretation of these instruments and the processes whereby they have been implemented can be studied in the commentaries on the Charter published by certain Governments and in their reports on the first two years of the United Nations; in the masses of documents, debates, resolutions, and reports of the United Nations General Assembly (especially the minutes of its Fourth or Trusteeship Committee and the *ad hoc* Committee on Palestine); in the minutes of the Security Council;[1] and in the detailed documentation of the Trusteeship Council. Certain constitutional documents issuing from the Trusteeship Council and provided for in the Charter are also of legal interest, such as its Rules of Procedure, draft Questionnaire, and Report to the General Assembly.

II. *The historical background*

The longer perspective afforded by the breakdown of the League system in a second World War and the setting up of the successor to the League, under political conditions very different from those of 1919, necessitates a re-examination of certain of the assumptions, both legal and political, on which League mandate theory and practice were based. Some of these assumptions continue to underlie the trusteeship system; others have been modified by it. Thus the Charter by Article 84 cleared away the vague notion that the special nature of a mandate or trust territory confers upon it a species of quasi-neutral status. It can no longer be regarded as segregated from the state system of the world and the political relations of the Powers or be disregarded as an element in the balance of power and a factor in the security calculations and defence systems of the Powers. The change made by the Charter was necessary because in practice mandates and trust territories proved to be as much open to attack and in need of defence as any other areas. Their strategic positions, man-power, and resources made some of them factors of importance in the war. All were involved in the belligerency of the mandatory Power, though in most cases its consequences were circumscribed by certain of the stipulations of the mandate.

Other assumptions which have been challenged by the collapse of the League and the setting up of the trusteeship system are the following: the complete separation of international mandates from national dependencies; the conception of the open door as an absolute good; the assumed superiority of a mandates commission composed of impartial persons independent of their Governments, as compared with a supervisory body composed of Government representatives; and the idea of the inherent superiority of a single-state mandatory over direct League administration, and still more over joint administration by several Powers. The condominium was one of the universally rejected alternatives of 1919. It came to be regarded as so discredited as to merit no further attention from students of the mandate system, and the last thing they perhaps dreamed of was that it would come back into favour in a future world Charter. Yet it slipped back almost unnoticed into Article 81 of the United Nations Charter.

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[1] E.g. February to April 1947 (Pacific Islands Trust Agreement).

The longer perspective and the wider view afforded by this process of revision bring into focus an aspect much neglected, both in the literature and in mandate theory as interpreted by Governments and the organs of the League. This is the relationship of mandates and trust territories to further examples of the international territorial régime; to neutralized and demilitarized zones or areas subjected to other kinds of international regulation such as the 'open door'; to the phenomena of buffer-states, and areas subjected to minority treaties. As we shall see, this wider context was much in the minds of delegates at Paris in 1919. They discussed the Saar and Spitzbergen as part of the context of mandates. The proposed Italian mandate in Albania, and the plan to carve up Turkey itself (apart from its provinces) into five or six mandates, arose out of the need to 'compensate' Italy as a means of ending the Adriatic deadlock. Other expedients discussed for this purpose included also other suggested mandates or international territorial régimes in the Adriatic and the demilitarization and neutralization of certain areas in that region.

Once, however, the mandate system was a going concern the context was forgotten. It was forgotten because compromise had been successfully achieved. The short history of the United Nations has made us continually aware of the full political context, because of the difficulty of achieving a real compromise as distinct from mere diplomatic formulae. The long-drawn controversies over the conversion of the League mandates into United Nations trust territories and the projected trusteeships in Italian colonies in Africa; the rivalries over the special trusteeship régime in Trieste and the long delay in replacing the three-Power occupation by the special régime provided for in the Treaty; the degeneration of the proposed four-Power trusteeship for Korea into an indefinite two-Power occupation—all these illustrate the point that mandates and trusteeship are part of the phenomena of the 'international frontier' to which reference is made below. A full awareness of this wider context is essential to an understanding of the real significance of international mandates and trusteeship in the working of the state system and in the successive phases of the effort to maintain peace by means of the Concert of Europe, the League of Nations, and the United Nations.

Mandates and trusteeship derived from the Turkish Empire and the partition of Africa. From an historical point of view League mandates might be described as a belated phase of the two great problems which had formed the centre of European foreign policy for the best part of a century, namely, the liquidation of the Turkish Empire and the partition of Africa. Such a description may seem to run counter to the traditional view. Under the influence of President Wilson's Peace Conference slogan of the 'New Order', the mandate system came to be regarded as a sudden new departure in history. It is true that from the point of view of international law it had some elements of novelty. Though most of the components of the mandate system had occurred in the past, separately or in partial combination, this was the first time they had all been fused together as part of a general international organization set up by treaty.

That the slogan of the 'New Order' had such an influence on thinking with regard to the mandate system calls for explanation. No doubt the answer lies in part in the definiteness of the system, its embodiment in a set of legal instruments which seemed to give final decisions on its central elements. Moreover, the speed and efficiency with which it was put into operation tended to make for a concentration on its legal and practical aspects. But another part of the answer is to be found in the working of the mechanism to which W. E. Hall drew attention in a famous passage in the third edition of his *International Law* (1889)—the 'reaction of lassitude and to some extent of conscience' following a great war. Peace Conferences are under a strong temptation to buttress optimistic hopes for the future by disparagement of the past. Thus the San Francisco Conference of the United Nations, though following the Geneva pattern at many points, maintained a conspiracy of silence about the League of Nations, and avoided as far as possible the phraseology of the Covenant. This was especially true of the trusteeship system, which was modelled on the mandate system but with a complete set of new terms and organs. In Paris in 1919 there was the same disparagement of the remarkable record, as we now see it, of the Concert of Europe in maintaining general peace in the hundred years from the Congress of Vienna. It was out of the experience gained by the Concert of Europe in handling Mediterranean, Balkan, Middle East, and African questions that the basic ideas of the League mandate system emerged.

The handling by the Concert of Europe of the continuous series of problems which arose from the decay of the Turkish Empire developed the principles of collective action and responsibility of the Powers for peoples 'not yet able to stand by themselves'. Emphasis on the humane treatment of minorities was a feature of British policy towards Turkey, particularly under Gladstone. The various kinds of tutelage devised by the Concert, either in the form of mandates to individual powers or international régimes of different sorts, had humanitarian as well as other objectives.

The international system of the Conventional Basin of the Congo, devised by a series of international conferences between 1884 and 1912 and defined by treaty, made the whole of Middle Africa a zone of international regulation. The Powers agreed that their sovereign rights in their African territories should be limited in the general interest by the acceptance of a series of international obligations. These obligations included not only the 'open door', equal treatment in regard to transport on and navigation of rivers, regulation of liquor traffic and traffic in arms, but also for the first time in a general international treaty the principle of the 'sacred trust'. For in the Berlin Act of 1885 the Powers bound themselves 'to watch over the preservation of the native tribes and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery and especially the slave trade'.[1]

Some at least of the older statesmen of Europe at Paris in 1919, such as Clemenceau and Lloyd George, understood well enough the close historical connexion between the mandate system and the collective action of the Concert of Europe in Turkey and in the devising of the Congo Basin system; for they had lived all through this from the 1870's onwards. 'There was no large difference', Lloyd George remarked at the Conference, 'between the mandatory principle and the principles laid down by the Berlin Conference'; the main difference as he saw it was the absence in the latter of 'external machinery of enforcement'.[2]

The development of the League mandate system from 1920 onwards was marked by something in the nature of a paradox. Historically, mandates in tropical Africa were a secondary phenomenon, the result of the application in Africa of ideas and expedients tried out first in the Mediterranean, the Balkans, and the Near East. Yet under the influence of the idea, current in Geneva and elsewhere, that League mandates were the ideal government for colonies and inherently superior to national trusteeship, the assumption began to be made that the 'typical' mandates were those in colonial areas in Africa rather than in the Middle East. The Middle East mandates tended to be regarded as special cases, and in any case they were temporary stages on the road to independence and so perhaps of passing interest. The Mandates Commission was not very happy in dealing with the highly 'political' 'A' mandates. Its main interests were rather legal and technical; it was most at home dealing with the 'B' mandates in Africa which it knew best; and it was perhaps least effective in relation to the remote and little known territories of the Pacific.

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[1] Though this was the first enunciation of the principle in a general international agreement, trusteeship had for long been a principle of British colonial policy. The phrase 'sacred trust' was used by Burke in his opening indictment of Warren Hastings before the High Court of Parliament on 15 February 1788.

[2] *U.S. Foreign Relations: Paris Peace Conference, 1919*, vol. iii, p. 750.

On the other hand, the League during its lifetime almost completely ignored the most significant aspect of pre-League collective action in Africa, namely, the regional treatment of the whole of Middle Africa. In the matter of the needs of dependent territories the design of the drafters of the Covenant went beyond the small group of ex-enemy territories covered by the mandate system. That design included the existing system of African regionalism. After Article 22 of the Covenant had been drafted the colonial experts in Paris took up as their next task the revision of the network of nineteenth-century multilateral treaties dealing with common African problems. Regionalism was balanced in the design by 'universalism', that is, League action on a world scale in matters of common concern. In theory, at least, such action would include in its benefits dependent territories in Africa and elsewhere. In practice, most of the matters which the League attempted to handle on a world scale had little relevance to the special needs of tropical Africa. But Geneva was always vaguely afraid of regionalism of any kind as likely to divert the interest and activities of the Governments and to endanger League unity. In practice, therefore, the League did little for Africa.

The difficulty was not one of legal competence. For the League was given at several points in the St. Germain Treaties of 1919 (revising the Berlin and Brussels Acts) footholds which it failed to exploit. It did nothing about traffic in liquor, and killed the arms traffic convention in attempting to generalize it on a world basis. What was done by way of supervising the application of the African conventions was done mainly by the Mandates Commission in the seven territories under mandate in Africa. The Commission frowned on regional grouping for fear that the mandated territories might gradually be absorbed in neighbouring colonies under national sovereignty. Yet it was hampered by the fact that most important African problems were not localized in particular territories, but common to the whole continent. Moreover, it acted in a semi-judicial capacity and its work was mainly to review what had taken place long after it had happened. It was the Governments, and not the Mandates Commission, which were responsible for initiating policy and taking action on problems as they arose. Thus the Tanganyika annual report in 1938 reported (p. 33) large 'swarms of migratory locusts' in the territory. It was not until December 1939 that the Mandates Commission could ask a question about them. No single Government, let alone the Mandates Commission, could cope with the locusts which, like tropical diseases, are an international problem. It was the Governments themselves, partly under the spur of war-time necessity, which revived the conception of regionalism in Africa. The Middle East Supply Centre touched East Africa. The British East African Governors' Conference was strengthened, and the British West African Council set up. Since the war, technical conferences on various matters of common interest, between British, French, and Belgian African administrations, point towards a still more highly developed regional organization of the kind that is taking form in the Caribbean and in the South Pacific.[1]

The decay of the regional conception under the League was thus one of the unexpected results of the setting up both of the League and of the mandate system. The result was all the more surprising since the British and American colonial experts at the Paris Peace Conference were even more interested in developing the regional system for Africa, as pioneered in the Congo Basin treaties, than in putting seven scattered African territories under a new international form of trusteeship. They treated the mandate system as an adjunct to the regional system of the African treaties rather than as a substitute for it.[2]

Quite apart from the Congo Basin Treaties, the League had a general competence under the Covenant which offered it the possibility of taking up issues specially affecting dependent areas. Article 23(*b*) provided that 'Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League . . . (*b*) undertake to secure just treatment of the native inhabitants of territories under their control'. It is true that this was a competence which, according to a general interpretation, could only be exercised in accordance with subsequent international agreements. But the League Assembly on 7 December 1920 agreed with the view advanced by its First Committee that the League could act under this clause if the Governments agreed to allow it to act. In fact, much of the action taken under other clauses of Article 23 was not based on the express provisions of international conventions but was taken with the agreement of the Governments. It was one of the mysteries of the Covenant that Article 23(*b*) should have remained dead wood, whilst each of the other six clauses of Article 23 grew into one or more League technical organs.

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[1] The Anglo-American Caribbean Commission set up in March 1942 was widened in 1946 into the Caribbean Commission by the addition of the French and Netherlands Governments. A six-Power conference (Australia, France, the Netherlands, New Zealand, United Kingdom, and United States) signed an Agreement on 6 February 1947, to set up the South Pacific Commission on similar lines.

[2] The absorption of the experts in the regional system of the Berlin and Brussels Acts, and their view of mandates as adjuncts to it, are evident from G. L. Beer's *African Questions at the Paris Peace Conference* (1923); A. H. Snow's *The Question of Aborigines in the Law and Practice of Nations* (1919) (a State Department brief); Professor Berriedale Keith's *The Belgian Congo and the Berlin Act* (1919); Sir Sidney Olivier's *The League and Primitive Peoples* (1918); and Sir Harry Johnston's article on 'International Interference in African Affairs', in *Journal of Comparative Legislation and International Law*, 1918.

International mandates and trusteeship in Europe. Part at least of the misconceptions regarding the real nature of the mandate system and its historical significance can be traced back to a misunderstanding of Field-Marshal Smuts's proposals published on the eve of the Paris Peace Conference.[1] On the one hand he was credited, not altogether correctly, with originating the idea of the mandate system; whilst on the other hand he was blamed for misapplying it by confining it to Europe and the Middle East and not extending it to the ex-German territories in Africa and the Pacific. The reason for this restriction was simple: he took mandates to mean self-determination after a temporary period of tutelage; and African and Pacific territories obviously would not be ready for self-government for a very long period of time. Whilst his critics were preoccupied with the omission of Africa, they failed to appreciate the great importance of his contribution in summing up in a single generalization the problem created by the fall of the empires and the various expedients which would have to be adopted by the Powers and by the League. He saw the League of Nations as the 'liquidator or trustee of the bankrupt estate' of the Old World. It was the 'successor of the empires' of Russia, Turkey, Austria-Hungary, and Germany, which had been based on the inequality and bondage of their peoples and had to be reconstructed on the basis of nationality and self-determination. Some states, like Poland and Czechoslovakia, could become independent at once. For others, a period of temporary tutelage was necessary; for these he used the word 'autonomies' and gave as illustrations Mesopotamia, Syria, and Lebanon. They would need to be 'befriended, advised, and assisted in varying degrees by individual great states'. Still other territories could not have immediately any form of autonomy because their peoples were deeply divided on racial lines; these would have to be placed under mandate. Examples he gave were Palestine and Armenia. The League would have to act, he thought, through a national mandatory, since past experience had shown that direct international territorial administration tended to become, as he put it, 'paralysis tempered by intrigue'. Thus all the different expedients, including mandates, which had to be devised to cope with the problem left by the fall of the empires were viewed as parts of a single context. The succession states shaded off by varying degrees of autonomy into protectorates and mandates. The close relationship of minority provisions to mandates was brought out. Demilitarization, the 'open door', and minority protection were seen not as conditions peculiar to mandates alone, but as general conditions applying to succession states as well as 'autonomies'. The relevance of this wide generalization to the problems of peace-making after the Second World War is obvious enough, and there is perhaps less danger now of its being forgotten than there was in the period of the League.

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[1] Smuts, *The League of Nations—A Practical Suggestion* (1918).

The recent publication by the United States of the records of the Paris Peace Conference and the minutes of the Supreme Council have now revealed the full extent of the influence on the treaty settlement of General Smuts's ideas.[1] The records show the falseness of the general assumption (due in part to the phraseology of Article 22 of the Covenant) that mandates were entirely an extra-European affair. The records reveal that the Peace Conference discussed at least half a dozen mandates for different parts of Europe, as well as a similar number for Turkey in Europe, Anatolia, and the borderlands of Russia. One of the European mandates in fact came into existence: namely, the Saar Territory. Under Article 49 of the Treaty of Versailles, Germany renounced government of the territory in favour of the League 'in the capacity of trustee'; and League publications regularly referred to the Saar as 'under the trusteeship of the League'.[2] It was in fact precisely the kind of trusteeship territory under 'the Organisation itself' provided for in Article 81 of the United Nations Charter. The terms of trusteeship were set out in Articles 45 to 50 of the Treaty of Versailles and the Saar Annex of the Treaty. The construction of fortifications was forbidden as in the case of mandates. Government was exercised through the Saar Governing Commission of five members appointed by, and responsible to, the League Council. The League Council's instructions to the Governing Commission (13 February 1920) laid down the fundamental principle of the 'sacred trust', namely, that the Commission's sole interest should be the welfare of the inhabitants. Provision was made for regular (quarterly) reports to the League Council, as well as for petitions.

The records of the Paris Peace Conference have revealed that this complete League trusteeship was an alternative to a direct French mandate over the territory which was the first proposal considered by the Conference.[3] Now back again under French control, but with legal status still unsettled, the Saar seems doomed by its position and its coal to be a sort of shuttlecock of the international frontier. French, then German, then international, again German, it awaits, with the Rhineland and the Ruhr, the next turn of the wheel.[4]

[1] *U.S. For. Rels.: Paris Peace Conference, 1919*, vols. i–xiii.

[2] E.g. *Ten Years of World Cooperation* (1931) and *Essential Facts About the League* (1938).

[3] *U.S. For. Rels.; Paris Peace Conf. 1919*, vol. v, pp. 61, 66–70.

[4] The British draft agenda for the meeting of the Council of Foreign Ministers in November 1947 referred to the integration of the Saar into the French economy, whilst the French agenda referred (under security, disarmament, and demilitarization) to special régimes applicable to certain parts of Germany (Ruhr and Rhineland).

The most complete European mandate was a draft mandate to Poland in respect of Eastern Galicia. This was a fully elaborated text devised by the Supreme Council in 1919, and now published for the first time in the records of the Peace Conference.[1] Polish troops were in occupation of the territory, which in the end was finally assigned to Poland in 1923 and as such was covered by the Polish Minority Treaty. It thus illustrates the affinity between a minority treaty and a mandate to which further reference is made below. Thus there was an actual trusteeship territory on the western frontiers of Germany, and a projected mandate on the unstable frontier zone between Poland and Russia. In the extreme north the possibility emerged of still another mandate—a mandate to Norway over Spitzbergen. This was a territory without permanent inhabitants, so that the 'sacred trust' was narrowed down to the matter of resources and strategic importance. The idea of a Norwegian mandate was abandoned and Spitzbergen was finally placed, by the Treaty of 9 February 1920, under Norwegian sovereignty subject to special trusteeship provisions. The Treaty provided for the demilitarization of the territory and for the 'open door' to assure to the citizens of any country equal access to the resources of Spitzbergen. 'As the archipelago is actually a territory not belonging to anyone,' the Spitzbergen Commission reported, 'everyone agrees upon the necessity of ending this state of affairs by giving it a definite status.'[2]

In southern Europe the ancient frontier line of the Adriatic gave rise at the Paris Peace Conference to several mandate projects. A scheme for an Italian mandate for Albania was published in Temperley's *History of the Peace Conference of Paris*. The Albanians preferred a United States mandate. In the end they were to receive independence. Albania was an interesting example of the ease with which an unstable area on the international frontier could be made the subject of a series of solutions typical of the frontier. Between 1912 and 1920 it passed through the following phases: (1) an international régime of the type which the Berlin Congress had devised in 1878 for Bulgaria and Eastern Roumelia; (2) partial annexation; (3) a 'small autonomous neutralised state' comprising territory in the centre of Albania under Italian protection; (4) an Italian protectorate; and (5) the projected mandate referred to above. It became in December 1920 an independent state—a condition which lasted for nineteen years until its reoccupation by Italy in the spring of 1939.[3]

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[1] *U.S. For. Rels.: Paris Peace Conference, 1919*, vol. ix, pp. 115 and 272–83 (Text of Mandate). See also vol. iv, p. 848, and vol. vii, p. 280.

[2] Ibid., vol. viii, pp. 351–63. The status of the archipelago, now a still more important outpost on the frontier between the Eastern and Western groups of Powers, was again the subject of diplomatic exchanges between several of the Powers early in 1947.

[3] Temperley, op. cit., vol. iv, pp. 339–45. See also *U.S. For. Rels.: Paris Peace Conference, 1919*, vol. vi, pp. 78–91; vol. viii, pp. 228–9; vol. ix, p. 423.

Another example of the fluidity characteristic of the international frontier was the case of the Sanjak of Alexandretta. It was detached from the Turkish Empire in 1919 to form part of the mandated territory of Syria. Under the pressures caused by the oncoming war in Europe Turkey succeeded in 1937 in prising it loose from the mandate. It was demilitarized and subjected to a joint international régime under the League with France and Turkey exercising supervision as agents of the League and guaranteeing its territorial integrity. The arrangement ended in its reabsorption into the Turkish State in 1939.[1]

The proposed mandate for Albania was merely an episode in the prolonged Peace Conference deadlock over Fiume. The deadlock produced many different proposals, including a 'Free City' under the League, like Danzig, with demilitarization;[2] the neighbouring cities of Zara and Sebenico were to be put under League mandate or made free cities. Certain of the Adriatic islands, and the Dalmatian coast, were to be demilitarized, with or without neutralization.

After the Second World War the same frontier of the Adriatic was to produce an even more serious deadlock between the Powers—which was not solved by the arrangements provided for in the Peace Treaty with Italy of 10 February 1947, namely, the Permanent Statute of the Free Territory of Trieste and the demilitarization of a series of islands in the Adriatic and the narrows of the Mediterranean. The territorial settlement of Italy in Africa, which was discussed in the same context and subject to the same Great Power rivalries as the settlement of Italy in Europe, was postponed by the Treaty for further negotiations between the Four Powers. If they failed to agree by 15 September 1948, the United Nations General Assembly was to make a recommendation for a settlement to be given effect to by the Four Powers. Under its Permanent Statute, the Free Territory of Trieste becomes an international dependency of the Security Council. It is subjected to a special form of international trusteeship under a Governor-General to be appointed by, and made responsible to, the Security Council, to which he is to render annual reports. The territory is not only to be demilitarized like the Saar, but also neutralized. The Statute was not, however, based on Article 77 (1) (*b*) of the Charter.[3]

The same tendency for international mandates or trusteeship (or international régimes with some mandate features), to recur in areas left in a chaotic condition and open to competition between the Powers as the result of the defeat or decay of an empire, was shown throughout the area of the Turkish Empire—in the Nile Valley, in Libya, in the Middle East, and in the Balkans. The independence of Turkey itself was only saved when its revived military strength under Mustapha Kemal proved that it could ward off foreign intrusions. The first thought of the Supreme Council in 1919 had been to partition Turkey into mandates to be held by France, Italy, and Greece, the United States being made mandatory for Constantinople and the Straits as well as for Armenia.[1]

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[1] League of Nations, *Official Journal*, February 1937, p. 119; Hourani, *Syria and Lebanon* (1946).

[2] The 'Free City' proposal was described by Lloyd George as 'somewhat similar to the Saar Valley settlement'. See *U.S. For. Rels.: Paris Peace Conference, 1919*, vol. v, pp. 136, 218–19.

[3] That Article does not say 'overseas' territories but merely 'territories which may be detached from enemy States as a result of the Second World War'. It might therefore be applied to parts of the metropolitan territories of enemy states as well as to overseas territories.

The continuity of mandates from the Concert of Europe, through the League, to the United Nations. The four Middle East mandates actually set up in 'certain communities formerly belonging to the Turkish Empire' were, as mentioned above, a belated phase of the Eastern Question.[2] In the nineteenth century the independence of a people which had revolted successfully against the Turks was usually recognized by the Powers subject to guarantees by the new state for the protection of its racial or religious minorities.[3] Provisions for the protection of minorities were also inserted in the 'A' mandates, which in a sense were merely delayed succession states. It was the plight of the Jewish minorities in central Europe which gave Mr. Lloyd George and President Wilson during the Paris Peace Conference the idea of linking together as complementary solutions the minority treaties in the succession states and the mandate for Palestine.[4] The historical continuity of the process is shown by the Partition Plan for Palestine adopted by the Second General Assembly. It provides that on the laying down of the Mandate it shall be replaced by two states. These states are required to adopt as 'fundamental laws of the State' guarantees regarding, *inter alia*, religious and minority rights and protection of holy places.[5]

Both the Palestine and the Syrian mandates had direct links with pre-League nineteenth-century mandates. The idea of the return of the Jews to a National Home in Palestine began to be discussed in London soon after the outbreak of the First World War. Sir Edward Grey, British Foreign Secretary, looking for precedents found them in the mandate given by the Powers to France in 1860 to intervene in the Lebanon to protect the Christian minorities, and in the mandatory régime set up by the Powers in Crete in 1897.[6] The international régime set up for Crete by the Concert of Europe in 1897–8 was of special interest. The island, though still nominally under the Sultan of Turkey, was given an autonomous régime under a Governor appointed by the Powers, who made quarterly reports to them. The Powers supplied troops for police purposes and made initial grants toward the cost of government. The withdrawal of the international troops began in 1908, though the special régime continued until the First World War.

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[1] *U.S. For. Rels.: Paris Peace Conference, 1919*, vol. v, pp. 393–5.

[2] Certain areas in the Arabian peninsula were left outside the mandates and became later the independent states of Saudi Arabia and the Yemen.

[3] Temperley, op. cit., vol. v, p. 112.

[4] *U.S. For. Rels.: Paris Peace Conference, 1919*, vol. v, pp. 393–5.

[5] Report of the *ad hoc* Committee on the Palestinian Question: U.N. Doc. A/516, 25 November 1947.

[6] Lord Samuel gives in his *Memoirs* (1945) details of a conversation with Sir Edward Grey on this point on 5 February 1915.

Still earlier, the Powers had devised a highly interesting series of international régimes with mandatory features for various parts of the Balkan areas of Turkey. In the Constantinople Conference of 1876–7 the Powers attempted to deal with the Bulgarian question by a scheme similar to that for Crete, referred to above. When this broke down in war between Russia and Turkey, the Powers met in the Berlin Congress of 1878 to devise régimes with mandatory features for the autonomous states of Bulgaria and Eastern Roumelia. The arrangements were dominated by minority problems and by the important strategic interests of both Turkey and Russia. Even the arrangement as regards the provinces of Bosnia and Herzegovina, by which they were to be 'occupied and administered by Austro-Hungary' (Art. XXV of the Berlin Treaty of 13 July 1878), had at least one element in common with mandates: namely, the denial of the right of Austria to annex.[1]

A somewhat similar series of expedients was tried by the Powers in the decade from 1897, in an attempt to deal with the troubles in Macedonia caused by Turkish misrule and the incursion of armed bands from neighbouring Christian states.[2] Fifty years later, in the same area, the United States was to intervene, with the assent of the great majority of the Powers, to assist the Greek people to become strong enough to stand against pressure from its northern neighbours. A United Nations Commission was appointed to watch the Greek land frontiers.

In this same general context should be mentioned also the condominiums in Egypt (Anglo-French, 1879–82) and the Sudan (Anglo-Egyptian, from 1899 onwards), together with the international régimes applied to the two great entrances to the Mediterranean, the Suez Canal Zone and the Straits. These developments grew out of the chaotic conditions resulting from the decay of the Turkish Empire and the competing interests of the Powers in relation to areas or routes of vital strategic and economic importance. They were international compromise solutions. The Suez Canal Convention of 1888 provided for the international regulation of the Canal, with Great Britain acting as the agent of the Powers, and for the neutralization and demilitarization of the Canal Zone. The international régime of the Straits is based on a series of treaties running back to the eighteenth century. Following the Crimean War neutralization of the Black Sea was imposed by the Treaty of Paris of 30 March 1856, and lasted till 1870–1. The Dodecanese Islands commanding the entrance to the Dardanelles were demilitarized under the Peace Treaty with Italy of February 1947.

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[1] For details on these Balkan 'first mandates' see Medlicott (*The Congress of Berlin and After*), who drew my attention to them.

[2] Gooch, *History of Modern Europe, 1878 to 1919* (1923), pp. 399 ff.

The shores of the western Mediterranean and its Atlantic entrance also produced international compromise solutions. One was the police mandate in Morocco given by the Powers to France and Spain (to be exercised under a Swiss Inspector-General) under the General Act of the Conference of Algeciras of April 1906. This involved the principle of the responsibility of the mandatories to the Powers. Another is the international régime in Tangier. The régime was set up in its present form in 1923 (on the basis of an earlier treaty), revised in 1928, and restored in 1945. It provides for administration by an international municipal body with provision for the 'open door', capitulations, and neutralization.[1]

The international frontier and its phenomena. This all too brief summary of a highly intricate matter has dwelt on resemblances and connexions and common factors, whereas it has been more customary for lawyers in the past to draw legal distinctions and emphasize differences. It is believed that an over-emphasis upon such legal distinctions and differences and lack of attention to the wider context has resulted to some extent in obscuring rather than explaining the significance of international mandates and trusteeship. A clearer view of the processes at work and the legal instruments in which they have resulted would be gained, it is submitted, by studying together as a series phenomena which in the past have perhaps been viewed too much as separate entities. Amongst the things which belong together as phenomena of the international frontier may be mentioned the following: international mandates and trusteeships, including the many rudimentary mandates of the pre-League period; condominiums; international territorial régimes of various kinds; protectorates under various guises, involving tutelage by one or several foreign Powers, tacitly or openly recognized by other Powers; minority treaties; neutralized and demilitarized zones, including waterways; areas such as the Conventional Basin of the Congo, Spitzbergen, and parts of China subjected by international treaty to an 'open door' régime, together with, in some cases, special safeguards for the indigenous population; regions subject to various other foreign economic and judicial controls (extraterritoriality, capitulations, and similar arrangements).

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[1] It was agreed at the Potsdam Conference on 2 August 1945 that the International Zone of Tangier 'which includes the City of Tangier, and the area adjacent to it, in view of its special strategic importance, shall remain international'. Great Britain Miscellaneous, No. 6 [1947].

Broadly speaking, the international frontier may be defined as comprising the zones in which the Powers, particularly the Great Powers, expanding along their main lines of communications to the limits of their political and economic influence and their defence requirements, impinge upon each other in conflict or compromise. Whilst it is the main line of weakness in the earth's political structure and has produced much international conflict and warfare, it has also exercised a major part in the shaping of international arrangements and institutions. The frontier is marked by zones of low political pressure or partial vacuum, into which other states are inevitably drawn so that their interests and spheres of influence tend to overlap and clash. But phenomena of the international frontier may occur at points where the national frontiers come together, as in the Saar territory. Moreover, Great Power relations in frontier zones are liable to be affected by local conflicts, such as that between Jew and Arab in Palestine. Of importance also for an understanding of the phenomena of the international frontier are the zones in which such phenomena *do not occur* because of the manifest political preponderance of some Great Power. Thus in modern times few, if any, of the phenomena of the international frontier have occurred in the Western Hemisphere.

Historically the main zones of the international frontier on which can be plotted out all the cases mentioned above, and others not mentioned, have been as follows. In western Europe: the line from the Lowlands to the Adriatic[1] (marked, *inter alia*, by the neutrality of Belgium, Luxembourg, Switzerland, the Saar Territory, Fiume, Trieste, Albania, neutralized and demilitarized islands and zones in the Adriatic and the narrows of the Mediterranean). In eastern Europe: the zone from the Balkans to the Baltic (marked, *inter alia*, by the international régime of the Straits, the nineteenth-century Balkan mandates and international régimes mentioned above, the Eastern Galicia Polish mandate, Upper Silesia, Vilna, Danzig, the Aaland Islands,[2] Spitzbergen). Other principal zones have been the line of the Mediterranean, and parts of its shores; the triangle of the Turkish Empire, from the Nile to the Balkans, and eastwards to Mesopotamia; the border areas where Russia marches parallel with India and China, especially Afghanistan, Sinkiang, Tibet, Mongolia, Manchuria,[3] Korea (projected four-Power trusteeship but at present divided by a Russian-American frontier), and coastal areas of China from the 1840's until the abandonment by the Powers of their privileges under the 'unequal treaties'. In the Pacific, a broad zone of the international frontier is indicated by condominiums, neutralized areas, mandates, and trusteeship territories, and areas of disputed title.[1]

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[1] Including the Ionian Islands, for the government of which a mandate was conferred upon Great Britain by Russia, Prussia, and Austria in 1815. The cession to Greece in 1864 was made on the condition of permanent neutralization.

[2] Neutralized and demilitarized in 1921, and earlier in 1856.

[3] The Yalta Agreements of 11 February 1945 (G.B. Miscellaneous, No. 6 [1947]) provided for the internationalization of the commercial port of Dairen, restoration of the Russian naval base at Port Arthur, and the joint operation of the two main railway lines by a Soviet-Chinese company in a sort of economic condominium.

Historically the whole of Africa was part of the international frontier. Partition by the Powers did not wholly remove it from the frontier. Vast areas were subjected to some degree of international regulation (Conventional Basin of the Congo, mandates, condominiums in Egypt and the Sudan, &c.). Some further extension of international trusteeship is possible, e.g. in the former Italian colonies.

Moreover, dependent areas inhabited by people different in race from the metropolitan Power have always tended to be open to greater pressures from outside than the metropolitan territory itself. Chapter XI of the Charter furnishes a new lever that may be used in attempts to pry dependencies loose from the metropolitan Power, and to reopen them as areas of competition between the Powers. Nor have the Powers, with superweapons to hand, shown at any time a more anxious interest in regions however remote (even Polar areas) which might have strategic importance or indispensable strategic resources such as oil and non-ferrous metals. Moreover, a vast area of enemy territory in Europe and Asia is still under joint occupation of indefinite duration. What will come out of this fluid situation in the way of new legal instruments, with new combinations of characteristic devices of the international frontier such as demilitarization and international régimes, cannot be foreseen.

III. *The Bases of the system of trusteeship*

Transition to trusteeship and the question of sovereignty. The winding up of the international mandate system and the transition to trusteeship involved three different legal problems. First, in respect of the termination of the League of Nations itself, including its mandate functions; second, the transfer of the mandated territories to the United Nations trusteeship system; third, the setting up of the United Nations trusteeship machinery.

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[1] The following examples may be mentioned: (1) The Tripartite Condominium (1889–99) between Great Britain, the United States, and Germany over Samoa, which was neutralized. This was followed by United States and German annexation, and the taking over of the German half by New Zealand under mandate and trusteeship. (2) The Anglo-French Condominium in the New Hebrides from 1906. This was the last link in a chain of Anglo-French frontier adjustments, over the decade from 1896, involving Newfoundland, Morocco, Egypt, the Nile Valley, and the Burma–Indo-China frontier. (3) The partition of New Guinea between the Netherlands, Germany, and Australia, followed by the Australian mandate and trusteeship over the north-eastern part and adjoining islands. (4) The mandate and trusteeship over the island of Nauru. (5) The Japanese mandated area followed by the United States Pacific Islands 'strategic area' trusteeship. This is linked strategically with the Philippines where, under the 99-year Agreement of 14 March 1947, the United States received a score or more of bases. (6) United States claims to some 27 mid-Pacific Islands, title to which is claimed by Great Britain and New Zealand. This has produced a compromise in the form of the Anglo-American condominium over the islands of Canton and Enderbury agreed by the Exchange of Notes of 6 April, 1939, which provided for joint British and American control for 50 years, and thereafter until modified or ended by mutual consent.

The possibility of a Japanese mandate over Kiau Chau was suggested in the Supreme Council in 1919: *U.S. For. Rels.: Paris Peace Conference, 1919*, vol. v, pp. 109, 127–8, 245.

League functions in respect of mandated territories terminated for all practical purposes at the beginning of the Second World War.[1] The Permanent Mandates Commission, which was an advisory organ of the Council, held its last (37th) session in December 1939, and thereafter may be said to have existed only in name. The League Council ceased to function at the same time and neither the report of the Commission on its 36th nor that on its 37th session was ever examined by the Council. The stream of annual reports, which were the life-blood of the Commission, dried up at the beginning of the war. No reports for the 'A' and 'B' mandates were received by the League after the end of 1939, and none for 'C' mandates after 1941.[2] Only one member of the Mandate Section of the League (Mr. Peter Anker) remained on in the League Secretariat throughout the war.

Although the League's functions in respect of mandates had ceased for a number of years, legal propriety seemed to require that when the League was officially wound up in 1946 any interests, assets, and rights it might have possessed in the matter of mandates should be transferred to the United Nations. But no such rights or interests were discovered which could legally be transferred. The League Assembly on 17 April 1946, at its final session, passed a resolution on mandates which recognized that 'on the termination of the League's existence, its functions with respect to the mandated territories will come to an end'. The resolution made no attempt however, to bridge the legal gap between the Covenant and the Charter. It noted that 'Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League'. It went on to take note of the

> 'expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers.'[3]

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[1] The question of the belligerency of the mandated territories during the Second World War is discussed elsewhere in this volume. See below, pp. 389–92.

[2] Five 'C' mandate annual reports were received after December 1939 (Japan 1938, Nauru and South-West Africa 1939, Western Samoa 1939–40 and 1940–1). In reply to a question in the House of Commons on 26 July 1944, the Secretary of State for the Colonies said that 'The last reports on the administration of mandated territories for which His Majesty's Government are responsible were submitted to the League of Nations during 1939 in respect of the year 1938.' In any case, in time of war security considerations would seem to preclude the making of detailed annual reports on territories whether under mandate or United Nations trusteeship.

[3] League of Nations Doc. A.33, 1946, pp. 5–6. Report of the First Committee to the Assembly: General Questions.

Nothing could have been more informal than the way in which an Assembly resolution dissolved the mandate system. It ignored the role assigned by the Covenant (Art. 22) to the Council of the League. The texts of each of the mandates were cast in the form of a resolution of the Council; and each mandate wound up with the following clause: 'The consent of the Council of the League of Nations is required for any modification of the terms of this mandate.' This clause was ignored by the Assembly as it had been ignored in the case of Syria and Lebanon and of Transjordan—the independence of all of which the Assembly resolution welcomed. When on 13 December 1946 the texts of the eight mandates (six African and two Pacific) were replaced by trusteeship agreements, the League Council had ceased to exist.

Obviously the 'expressed intentions' of the mandatories could not as such confer any legal rights upon the United Nations. No new international obligations in respect of any mandated territory could exist until the 'other arrangements' referred to in the resolution had been concluded between the mandatory and the United Nations. This followed not merely from the nature of the contractual relations between the mandatory and the League as defined in the Covenant and the mandates, but also from the express terms of the Charter. The latter provided for an international trusteeship system; but the system could not function until territories had been placed under it by particular Powers; and as Articles 75, 77, and 79 of the Charter made perfectly plain, this could be only by virtue of 'subsequent individual agreements'. Such agreements or 'the terms of trusteeship . . . including alteration or amendment' had to be 'agreed upon by the states directly concerned, including the mandatory power'. Only then was the matter ripe for the 'approval of the General Assembly' (Arts. 79 and 85). Unless and until such a trusteeship agreement was concluded the rights of the mandatory were reserved (Art. 80).

In the nine months following the signing of the United Nations Charter careful studies had been made, both by Governments and by United Nations committees, of the whole problem of transferring League functions and assets to the United Nations. Careful inventories of these functions and assets had been drawn up. That in the case of mandates no transferable assets could be discovered brought to the ground one of the main theories of sovereignty, namely, that it lay with the League. If it had existed it would have been much the most important of the League's assets. If sovereignty did not lie with the League it certainly did not lie with the United Nations, since when the League expired no agreements of any kind had yet been made between the mandatory Powers and the United Nations to place any territory under the trusteeship system. Furthermore, when the trusteeship agreements were finally negotiated they gave no ground for any claim to United Nations sovereignty. Before referring to the other three main theories in Professor Quincy Wright's classification of the theories (that sovereignty lay with the Principal Allied and Associated Powers, or the mandatories, or the mandated communities), it is useful to look back at the procedure adopted in 1920 in setting up the mandate system.[1]

The Hymans report, adopted by the League of Nations Council on 5 August 1920, came to the conclusion that there was no divergence of opinion on the point that 'the right to allocate the Mandates, that is to say, to appoint the Mandatory Powers and to determine the territories over which they shall exercise authority, belongs to the Principal Allied and Associated Powers'. The *legal title* of the mandatory, he concluded, would be 'double': one conferred by the Principal Powers and the other conferred by the League, since the mandatory Power 'will govern *as a Mandatory and in the name of the League of Nations*'. The Principal Powers would first 'confer a Mandate'; secondly, 'officially notify the Council . . . that a certain Power has been appointed Mandatory for such a certain defined territory'. The Council then takes 'official cognisance of the appointment of the Mandatory Power', informs the Power that 'the Council considers it as invested with the Mandate', and 'notifies it of the terms of the Mandate after ascertaining whether they are in accordance with the provisions of the Covenant'. The Council resolution of 5 August 1920 specifically adopted the procedure thus outlined, adding the point that the Council would 'examine the draft mandates communicated to it'. The procedure as outlined was followed step by step in the actual setting up of the mandate system, as the preambles to the mandate texts bore witness.

As regards sovereignty, the Hymans report noted that, in the case of the 'B' and 'C' mandates, 'the Mandatory Power will enjoy, in my judgment, a full exercise of sovereignty, in so far as such exercise is consistent with the carrying out of paragraphs 5 and 6' (of Art. 22). The obligations thus imposed would in the case of the 'C' mandates be perhaps narrower, since the mandatory Power was permitted 'more nearly to assimilate the Mandated territory to its own'.

Thus according to this view, endorsed by the Council in adopting the report, the mandatory Power would enjoy a 'full exercise of sovereignty' in 'B' and 'C' mandates. Whilst it was stated that the 'legal title' to be possessed by the mandatory was conferred in part by the Principal Powers and in part by the League, it was not suggested that either of these entities would themselves retain any legal title to the territory. From this point on the Principal Powers faded out of the picture. Their role was completed. They were ignored in the Charter. They were not mentioned in any of the

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[1] Quincy Wright, *Mandates under the League of Nations* (1930), p. 319.

Trusteeship Agreements—not even in that of the United States of America. The United States was the one Power which had tried to keep alive the idea that the Principal Powers (of which the United States was the 'Associated' part) still possessed some residual title to the ex-German colonies.[1]

Moreover, the Principal Powers had now been reduced by the war to three—Great Britain, France, and the United States. Italy's claim, if any, was extinguished by the Peace Treaty with Italy of 1947, Article 40 of which reads: 'Italy hereby renounces all rights, titles and claims deriving from the mandate system or from any undertakings given in connection therewith, and all special rights of the Italian State in respect of any mandated territory.' A similar clause will probably be inserted in the Peace Treaty with Japan when it is concluded. Japan's claim in respect even of her own mandate was ignored in the Pacific Islands Trust Agreement.[2] As approved by the Security Council on 2 April 1947, the Agreement merely notes that 'Japan, as a result of the Second World War, has ceased to exercise any authority in these islands'.[3] It adds: 'the Security Council . . . having satisfied itself that the relevant articles of the Charter have been complied with, hereby resolves to approve the following terms of trusteeship for the Pacific Islands formerly under mandate to Japan'.[4]

The case of the Japanese mandate is of interest for several reasons in any discussion of sovereignty. It was the one and only case of the replacement of a mandatory Power by another administering authority. The mandate was replaced by a strategic area trusteeship agreement which gave wider legal power to the administering authority than Japan possessed and brought the territory legally within the strategic frontier of the United States. The administering authority was self-nominated, and not chosen by any group of Powers. It drew up its own terms of trusteeship without any prior consultation with other states, which were given the text at the same time as the United Nations.[5]

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[1] The United States of America was not a Principal Power in relation to Turkish territories since it was never at war with Turkey. Its rights as an Associated Power in respect of ex-German colonies were based on Art. 119 of the Treaty of Versailles as confirmed in the Treaty of 25 August 1921 between the United States and Germany. The rights of the United States and its nationals in relation to some of the mandates were secured by a series of treaties made between 1922 and 1925 with Great Britain, France, Japan, and Belgium in respect of their mandated territories. (No treaties were concluded with Australia, New Zealand, or South Africa.) The treaties included a provision that no modification should be made in the terms of the mandate unless agreed to by the United States.

[2] United Nations Doc. S/318, 2 April 1947.

[3] An amendment to say that Japan, having violated the terms of the mandate, 'has thus forfeited her mandate', was endorsed by the United States but in the end dropped. Another amendment, that the mandate had come to an end 'as the result of the signature by Japan of an act of unconditional surrender', was also abandoned: *Department of State Bulletin*, 20 July 1947, pp. 129–30.

[4] See below, p. 70.

[5] Copies of the draft were sent for information to New Zealand and the Philippines as well as to the members of the Security Council. Negotiations on the draft then took place through the diplomatic channels, followed by discussions in the Security Council. The remaining members

The mandate had been held by a non-member-state which had withdrawn from the League after engaging in aggressive war. It had used the mandated territory as a base for aggression in violation of the terms of the mandate. The territory was conquered by a state which was a Member of the United Nations but not of the League. The United States had kept alive its claims as an Associated Power by its treaty with Japan, but made no reference to such a claim in its draft trust agreement. The authority of Japan was treated by the United States as 'extinguished' by violation of the mandate, by conquest, and by unconditional surrender.[1] An amendment proposed by Australia in the Security Council, and supported by the United Kingdom and New Zealand, to delay the coming into force of the Trusteeship Agreement until the effective date of the Peace Treaty with Japan, was opposed 'most forcefully' by the representative of the United States and finally withdrawn. He held that the matter did not depend upon and therefore need not await the general peace settlement with Japan.[2] As the United States was now occupying the territory, and as it was 'the responsible administering authority', it declared to the United Nations its willingness to place the territory under trusteeship 'with the United States as administering authority'. Failure to conclude the agreement would have left the United States in possession of the territory.[3] By its 15th Article the Trusteeship Agreement cannot be 'altered, amended or terminated without the consent of the administering authority'. The Trusteeship Agreement recognizes the territory as the outer line of defence of the United States; and for security reasons American citizens are given a preferential position as compared with foreigners. Whether all this amounts to full sovereignty or not—and the United States has repudiated such a claim—it gives enough of the attributes of sovereignty for practical purposes. It is a 'full exercise of sovereignty' in the words of the Hymans report—less tramelled indeed than in the case of other trust territories.

All the mandatories save Japan were left in possession, with their existing rights conserved by Article 80 of the Charter, when the League came to an end. The League Assembly's last resolution (17 April 1946) recognized that their jurisdiction and duties continued unchanged. They were free

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of the Far Eastern Commission (Canada, India, and the Netherlands) were called in later to take part in the Security Council's discussions.

[1] Articles 79 and 80 of the Charter applied only to Members of the United Nations and recognized no rights of Japan as mandatory.

[2] In presenting the draft trust agreement to the Security Council on 26 February 1947, the United States representative said that 'by Japan's criminal acts of aggression she forfeits the right and capacity to be mandatory of the islands'. He went on to draw a distinction between, on the one hand, the mandated islands which he said 'never belonged to Japan, but were a part of the League of Nations mandate system', and, on the other hand, the 'islands belonging to Japan' of which the 'final disposition . . . must of course await the peace settlement with Japan'. *U.S. State Dept. Bull.*, 9 March and 20 July 1947.

[3] Mr. Dean Acheson: ibid. 3 February 1946.

to conclude trusteeship agreements, or not; and one of them chose *not.*[1] Trusteeship agreements could not be made without them. They refused to accept three suggested amendments and the General Assembly bowed to their wishes. Whatever the theories might be as to the nature of their title, their jurisdiction was not seriously challenged during the transition period.[2]

Repudiation by the administering authorities of claims to sovereignty. It is safe to say that the setting up of the trusteeship system will not end the controversy as to where sovereignty lies in a trust territory. Nevertheless, it seems clear that theories of League or United Nations sovereignty have been seriously undermined, whilst theories attributing some residual title to the Principal Allied and Associated Powers can no longer be seriously defended. On the other hand, the claims of the mandatory or administering authority have been strengthened.

It might be argued that the wording of Article 76 of the Charter in regard to political advancement and 'progressive development towards self-government or independence' strengthens somewhat the theory of sovereignty as latent in the mandated community. But 'self-government' as an alternative to 'independence' has been added, and the qualification about 'particular circumstances' of each territory may prove decisive for the foreseeable future in the case of territories still in a tribal or even pre-tribal condition, as it is for Palestine.

Moreover, support for any such theory in the General Assembly was insufficient to influence the texts of the trusteeship agreements. The Indian delegation gave as a ground for voting against their approval that 'There was no recognition of the sovereignty residing in the people of the Trust Territory nor the recognition of their latent independence.'[3]

A case can be made out for the view that a mandatory or trusteeship Power possesses sovereignty subject to the servitudes accepted by it under Covenant and Charter and the text of its Mandate or Trusteeship Agreement.[4] The theory of sovereignty subject to servitudes is strengthened by the provision for voluntary submission by a state of its own territory to trusteeship under Article 77 (1) (*c*) of the Charter. In such a case the state in question might reasonably claim that its sovereignty remained unimpaired apart from the limitations accepted voluntarily in the international agreement. Yet the form of its trusteeship agreement might not differ in essentials from other agreements.

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[1] See 'The Trusteeship System and the Case of South-West Africa', *infra*, pp. 385–9.

[2] In its report in November 1947 Sub-Committee II (Arab States and others) of the General Assembly's Special Palestine Committee took the view that the Palestine mandate legally terminated with the dissolution of the League. But its report went on to speak of the Mandatory Power as continuing to function and asked for reference to the International Court on the legal effect of the dissolution of the League.

[3] U.N. Doc. A/258, 12 December 1946: Report of Fourth Committee to General Assembly on Trusteeship Agreements. The Covenant (Art. 22) seemed to suggest that, in the case of an 'A' mandate, where the mandatory gave 'administrative advice and assistance' to the community, sovereignty might lie with that community. But in Palestine the mandatory was as much responsible for administration as in any other type of mandate, and the laying down of the mandate on 14 May 1948 left Palestine torn between conflicting claimants to the whole or part of the territory.

[4] Brierly, *The Law of Nations* (1930), p. 102, citing the view of the then British Colonial Secretary, Mr. L. S. Amery.

The weakness of this theory lies in the fact that the Governments concerned have been reluctant to support it. The fact remains that possession of full legal sovereignty, or even sovereignty subject to servitudes, has not been claimed by the mandatory Powers or administering authorities. Thus we seem to be forced back on the conception of the administering authority as having the legal right to the exercise of the attributes of sovereignty without full legal possession of it.[1] In the last analysis the status of an international mandate or trust territory has in it an element of uncertainty. A final settlement as to title has still to take place. Any uncertainty or ambiguity as to title to a territory tends to whet vague hopes of a reshuffle of power that might bring the territory into other hands which would know how to make good use of it.

The repudiation by the administering authorities of a claim to sovereignty or a right to annex has been in fairly clear terms. Thus the South African representative, in the General Assembly on 1 November 1947, declared that although South Africa did not have complete sovereignty over South-West Africa it did have definite rights entitling it to legislate for and administer the territory as an integral part of the Union.[2] Moreover, in insisting on the retention of the words '[as] an integral part' of Belgian, French, or British territory (in the Trusteeship Agreements for Ruanda Urundi and the French and British mandates in the Cameroons and Togoland) the three Governments were careful to minimize the purport of these words. They were necessary as a 'matter of administrative convenience', and were 'not to be considered as granting to the Governments of Belgium and France the power to diminish the political individuality of the Trust Territories'. The delegate of the United Kingdom explained that the words 'did not involve administration as an integral part of the United Kingdom itself' and that there was 'no implication of sovereignty or annexation'.[3] The delegate for France declared that 'France did not consider herself sovereign over the trust territory and had never claimed sovereignty in the past nor would in the future'.[4] The Australian delegation declared that the phrase 'as if it were an integral part of Australia' did not 'involve any power to annex the territory nor was there any claim to sovereignty'.[1] The New Zealand delegate disclaimed sovereignty whilst agreeing to drop the phrase 'integral part of New Zealand' from its agreement. In agreeing to delete from its trust agreement the words 'as an integral part of the United States', the United States representative informed the Security Council that his Government desired to 'affirm for the record that its authority in the trust territory is not to be considered in any way lessened thereby'.[2] But the 'explanatory comments on the draft agreement' published by the United States State Department noted that the phrase 'does not, of course, imply sovereignty over the territory'. The same comment was repeated in Article 9 of the United States Trust Agreement which permits a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction.[3]

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[1] For the distinction between sovereignty and the exercise of sovereignty see Oppenheim, *International Law*, vol. i (6th ed. by Lauterpacht, 1947), § 94 *n*.

[2] See 'The Trusteeship System and the Case of South-West Africa', *infra*, pp. 385–9.

[3] *Report of the Fourth (Trusteeship) Committee to the General Assembly:* U.N. Doc. A/258, Dec. 12, 1946. See below, p. 58, n. 3.

[4] U.N. Doc. A/C.4/85.

The negotiation of the Trust Agreements and the 'states directly concerned'. 'Awkward and ambiguous' provisions in the trusteeship chapters caused serious difficulties in the transition from Covenant to Charter.[4] Thus Article 86 constituting the Trusteeship Council was so worded that the Council could not be set up legally until trusteeship agreements had been concluded, although the Charter in Article 85 assumed that the Council would assist the General Assembly in the negotiation and approval of such agreements. In October 1945, when this flaw in the Charter was realized, an attempt to get over the difficulty by creating a temporary trusteeship committee had to be abandoned because of legal objections raised, *inter alia*, by the U.S.S.R.

Another difficulty was the form which a 'Trusteeship Agreement' should take. The references in the Charter seemed at first sight to envisage a multilateral treaty, agreed with and signed by 'the states directly concerned including the mandatory power'. But the use in this Article of 'terms of trusteeship' rather than 'trusteeship agreement' could be interpreted, as the British Government read them, as pointing rather to a process of consultation. In that case the 'states directly concerned' would not sign any formal instrument but would signify their agreement by some informal means such as a letter to the Secretary-General. The United States finally accepted this view, since to have cast the trust agreements in treaty form to be signed first by the 'states directly concerned', then approved by the members of the United Nations, and then perhaps ratified all round, would have invited breakdown.

It was agreed finally to follow the precedent of the mandates and to cast the trust agreements in the form of a resolution of the General Assembly (or Security Council) which would bear no signatures and not normally require any ratification.[1] As basic international constitutional documents the trust agreements have an importance which makes them unique amongst resolutions of the General Assembly. This procedure enabled the General Assembly to surmount, even though clumsily, one of the most awkward and ambiguous of the Charter's many loose phrases, 'the states directly concerned'. The phrase appeared in the American draft of a trusteeship chapter as circulated at the San Francisco Conference. Though its meaning has never been defined, the controversies over its meaning relate to a matter of substance. For the phrase is a trap-door covering a passageway leading to a central problem—the part played by mandates and trust territories in the political relations of the states and the balance of power. Whatever the theory and the legal forms might be, the allocation of a trust territory meant allocation to some one state of power, strategic position, and control over resources; so that a voice in the nomination of that state may be a matter of the utmost concern to other states, especially the Great Powers. The problem had been overcome in 1919 by the device of the Principal Allied and Associated Powers with which the peace treaties left the choice of mandatories. For various obvious reasons the same phrase could not be repeated in 1945 and far in advance of the peace treaties. But some phrase seemed necessary even if it had to remain undefined and in the end perhaps be found to be unusable.

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[1] U.N. Doc. A/258, 12 December 1946.

[2] U.N. Doc. S/P.V. 116, 7 March 1947.

[3] *State Dept. Bull.*, 9 March 1947.

[4] United States representative at the Fourth Committee, 7 November 1946.

An examination of the record of the Conference, including the informal discussions of the Five Sponsor Powers, and of all later discussions in London and New York, shows that no progress was ever made in clearing up the obscurity of the phrase. The task of interpreting it or of finding any means of determining and identifying the 'states directly concerned' was finally abandoned by the General Assembly as hopeless. One of the last attempts was the proposal of the American delegate on 7 November 1946 to interpret the phrase as meaning 'the *state or* states directly concerned'. 'Where', he said, 'the territory proposed to be placed under trusteeship is administered by a single sovereign its agreement is the only agreement required as a prelude to Assembly action.' In the case of a mandate the only state directly concerned would be the mandatory Power. He added the illuminating comment that if the phrase looked to legal title to a territory then 'in the case of the former German colonies . . . the states directly concerned would be the Principal Allied and Associated Powers', i.e. Great Britain, France, and the United States alone 'should be considered states directly concerned because of their joint title', the rights of Italy and Japan having been 'extinguished'. The Acting Secretary of State, Mr. Dean Acheson, had suggested in an interview on 22 January 1946 that the states directly concerned would include in the case of the

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[1] The United States Trusteeship Agreement required approval by the United States Senate.

Japanese mandate 'those states which had residual treaty rights in the area at the time the mandate was created', i.e. the Principal Allied and Associated Powers. These statements[1] bear out the explanation, current during the San Francisco Conference, that the phrase was originally intended to protect the legal claim of the United States to a share as an Associated Power in the title to ex-German colonies under mandate.

Unable itself to solve the problem, the General Assembly had thrust on the mandatory Powers the task of evolving a workable procedure. Its Resolution of 9 February 1946 invited the mandatory Powers to undertake 'practical steps in concert with the other states directly concerned' to draw up draft trusteeship agreements for presentation to the General Assembly if possible in September 1946.

The British Government had already led the way by circulating draft trusteeship agreements for its mandated territories to those states which it considered as 'in any case directly concerned' (Belgium for Tanganyika, France for the Cameroons and Togoland, and South Africa for all three). It circulated the texts *for information* to the United States, the U.S.S.R., and China (without prejudice to the ultimate interpretation of the phrase 'states directly concerned').[2] A somewhat similar procedure was adopted by other mandatories. France treated the United Kingdom as the state directly concerned in its mandates. Only the United States suggested any amendments to the texts thus circulated. As a result of much informal discussion between London and Washington before presentation to the General Assembly, a considerable number of changes were made in the British texts—nearly all in the direction of spelling out in greater detail the general clauses applying the provisions of the Charter. None were made in the Australian text.

The negotiations on the texts continued through the General Assembly; but despite over two-score meetings and 229 draft amendments, the texts emerged with almost no changes of substance. One change of interest was the dropping of the words 'integral part of New Zealand' from the New Zealand draft,[3] though Australia insisted on retaining it in the New Guinea Trusteeship Agreement in the form 'as if it were an integral part

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[1] For texts see *U.S. State Dept. Bull.* 3 February and 1 December 1946. Compare the statement of the Minister of External Affairs (Dr. H. V. Evatt) in the Australian Parliament on 13 March 1946: 'In my view the states directly concerned are those states only which have an interest recognizable by international law in the sovereignty, control or disposition of a territory.'

[2] Cmd. 6840 and Cmd. 6935. The process of amendment in the negotiations before and during the General Assembly is shown in detail in the texts as printed in *Mandates, Dependencies and Trusteeship*.

[3] See above, p. 55, on the retention of the phrase in the British, French, and Belgian Trusteeship Agreements. It has sometimes been overlooked that the phrase 'integral part' was not confined to the 'C' mandates, but occurred also in the British and French mandates for the two Togolands and the two Cameroons, and in that for Ruanda Urundi.

The British delegate explained to the General Assembly that in this context the phrase meant of Australia'.[1] Another change was the addition of a long article to the Australian Trust Agreement for New Guinea which in effect spelt out in detail the general clauses in the text applying the Charter.

The General Assembly accepted the legal position that every amendment had to be adopted by the mandatory Power and that the General Assembly itself had no power to amend by its own motion without the full consent of the mandatory state. Thus the Assembly's Fourth Committee rejected certain amendments (already carried by majorities in its Sub-Committee) since the mandatory Powers insisted that the amendments were unacceptable.

A further change was the dropping of clauses from the preambles which had stated that the provisions of Article 79 (agreement of 'states directly concerned') had been satisfied. Several delegations, including that of the U.S.S.R., objected that as the phrase 'states directly concerned' had not been defined the requirements of the Charter had not been met. The upshot was the adoption by Committee IV, by an overwhelming majority, of an 'understanding'. This formed the basis on which the eight Trusteeship Agreements were approved by the General Assembly on 13 December 1946 by the necessary two-thirds majority. The Understanding read as follows:

> 'All Members of the United Nations have had an opportunity to present their views with reference to the Terms of Trusteeship now proposed to the General Assembly for approval. There has, however, been no specification by the General Assembly of "states directly concerned" in relation to the proposed Trust Territories. Accordingly, the General Assembly in approving the terms of Trusteeship does not prejudge the question of what states are or are not "directly concerned" within the meaning of Article 79. It recognises that no state has waived or prejudiced its rights hereafter to claim to be a "state directly concerned" in relation to approval of subsequently proposed Trusteeship Agreements and any alteration or amendment of those now approved, and that the procedure to be followed in the future with reference to such matters may be subject to later determination.'

An amendment moved in the General Assembly by the U.S.S.R. to reject the trust agreements as contrary to the fundamental requirements of the Charter was based on three main grounds, only the first of which could reasonably be said to have legal substance. They were (1) that the

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integral part of adjoining territory, since Togoland and the Cameroons had to be administered for geographical reasons as parts of the Gold Coast and Nigeria. The phrase did not occur in the Tanganyika mandate because Tanganyika was a large enough entity to be administered alone. Compare Cmd. 6863 [1946]. As used in the 'C' mandates the phrase meant 'integral portion' of the territory of the metropolitan power. It was interpreted in the Supreme Council in December 1919 as meaning that the territory 'entered into the revenue and administrative system' of the mandatory power. See *U.S. For. Rels.: Paris Peace Conference, 1919*, vol. ix, p. 641.

[1] See above, p. 56, on the dropping from the United States Pacific Islands Trust Agreement of the phrase 'integral part of the United States'. Two other minor drafting changes in the text were agreed to by the United States during the discussions in the Security Council: see *U.S. State Dept. Bull.*, 20 July 1947.

states directly concerned had not been specified; (2) that the agreements made the trust territories integral parts of the administering Power; (3) that the agreements failed to provide for approval by the Security Council of military arrangements in the trust territories. Since 'an eightfold violation of the Charter could not justify a ninth', the U.S.S.R. opposed on the same grounds the approval of the Trusteeship Agreement for Nauru by the General Assembly at its Third Session.[1]

The General Assembly's approval of the Trusteeship Agreements in such circumstances was a reasonable interpretation of its responsibilities under the Charter. Its approval of the agreements has been accepted by the Trusteeship Council and by the great majority of the States Members of the United Nations as establishing the legal validity of the Trusteeship Agreements. However, the fact remains that a small but important group of Powers contest the validity of nine of the agreements and that in consequence the U.S.S.R. refused to participate in the setting up of the Trusteeship Council, or to attend it, on the ground that it could not be legally constituted on the basis of invalid trusteeship agreements.[2]

On the other hand, the U.S.S.R. accepted the United States 'strategic area' Trusteeship Agreement for the Pacific Islands, the most revolutionary of all the trust agreements because of its reversal of the old mandate theory as regards defence and security. The preamble as adopted stated that the Security Council had 'satisfied itself that the relevant articles of the Charter have been complied with'. Thus where the General Assembly failed the Security Council succeeded. Though their identity was still a secret, the mysterious 'states directly concerned' were nevertheless found to have agreed. (No doubt the explanation lay in the view of the U.S.S.R. that the states directly concerned include at least the five permanent members of the Security Council, which are also permanent members of the Trusteeship Council.) The jurisdiction of the Trusteeship Council, despite the doubt thrown upon its legality, was found to extend over at least this one Trust Territory.[3]

IV. *Comparison of mandate and trusteeship systems*

The legal structure of the trusteeship system rests on two piers: the first is the trusteeship Chapters of the Charter, and the second the Trusteeship Agreements. The second pier was constructed, as we have seen, mainly by the Mandatory Powers and the United States of America. The structure is probably not yet complete. Thus the provisions for trust territories under several governments or the 'Organisation itself' may result in highly important additions. A direct United Nations territorial administration was provided for in the American proposals for the Italian colonies.[1] The General Assembly's decision of 29 November 1947 on the partition of Palestine involves direct territorial administration of Jerusalem by the Trusteeship Council, which was charged by the General Assembly with the drafting of a legal text for this purpose.[2] The trusteeship Chapters were drafted on the assumption that they would be supplemented by Trusteeship Agreements more or less modelled on the pattern of the existing mandates. Article 87 of the Charter assigns certain functions to the General Assembly (and Trusteeship Council) to act 'in conformity with the terms of the trusteeship agreements'. General language about basic objectives in Article 76 is followed by the words 'and as may be provided by the terms of each trusteeship agreement'. The trusteeship Chapters have thus to be read alongside the corresponding articles in the agreements. The agreements, however, do more than apply the principles of the Charter. They add in the process a good deal of important interpretative detail (for example, on the 'open door'). The agreements also introduce new elements not to be found in the Charter. An example is the important provision enabling the Administering Authority to arrange for the co-operation of a trust territory in a regional advisory commission or regional technical organization. The principle of regionalism which the League allowed to die out is thus revived. But the revival came from the lead given by the mandatory Powers, and is not in the Charter.

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[1] U.N. Doc. A/C.4/SR 46, 15 October 1947.

[2] The U.S.S.R. appointed a representative to the Trusteeship Council on 25 April 1948.

[3] The controversial question of the mandated territory of South-West Africa is discussed elsewhere in this volume. See below, pp. 385–9.

Two other constitutional documents (provided for in the Charter), the Rules of Procedure of the Trusteeship Council and its Questionnaire (or questionnaires), illustrate the *modus operandi* of the system.[3] Though they cannot legally amend the Charter or Trusteeship Agreements they go far in interpreting and working out their implications. Thus the Charter's phrase 'accept petitions and examine them in consultation with the administering authority' is implemented by the eighteen rules of procedure on petitions. These provide, *inter alia*, for the oral presentation of petitions by petitioners appearing in person before the Trusteeship Council. Six rules of procedure cover the single clause on periodic visits to the Trust Territories (Art. 87 (*c*)).

The rigid classification of the mandates into 'A', 'B', and 'C' is not followed in the Charter, the provisions of which purport to apply equally to each trust territory. But this does not mean a rigid uniformity. For the Charter assumes that the 'particular circumstances of each territory and its peoples' will result in variations where necessary in the Trust Agreements. The agreements in fact fall into three or four groups corresponding to broad differences in the character and circumstances of the territories. One group comprises the former 'B' mandates in central Africa, the trusteeship agreements for which were negotiated together, built on the same model, and therefore closely resemble each other.[1] At the other end of the scale is the brief and simple agreement for the very primitive, still largely Stone Age, pre-tribal territory of New Guinea and the adjoining islands. Western Samoa, much higher in the scale of civilization than New Guinea, has an agreement closer in type to that of the 'B' mandates. Most distinctive of all is the new American 'strategic area' trusteeship for the former 'C' mandate held by Japan covering a vast area of the western Pacific.

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[1] Text in *New York Times* newspaper, 23 September 1947.

[2] U.N. Doc. A/516, 25 November 1947: Report of the *ad hoc* Committee on the Palestinian Question.

[3] I.e. in respect of ordinary trust territories. The procedures to be adopted in relation to 'strategic areas' by the Security Council and the role of the Trusteeship Council were left in doubt by the Charter. A Committee of Experts was appointed by the Security Council at the end of 1947 to examine this matter.

It is premature to attempt any real comparison between the mandate and trusteeship systems. 'Constitutions', as Professor Brierly has said, 'always have to be interpreted and applied and in the process they are overlaid with precedents and conventions which change them after a time into something very different from what anyone, with only the original text before him, could possibly have foreseen.'[2] It is for this reason that the emphasis of the present article has been on the initial problems of setting up the trusteeship system rather than on a commentary on the provisions of the Charter which have not yet been tested in action. There are as yet, for example, no cases (other than the special case of Trieste which is still only a statute on paper) of direct international administration by 'the Organisation itself'. Nor is there yet any United Nations condominium under the provision in Article 81 that an administering authority may be 'one or more states'.[3] Whether or not the Covenant was wiser than the Charter in rejecting condominiums and direct international administration for dependent areas remains to be seen. If the régime of the Saar

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[1] Even here there are differences. Thus a change of government resulted in the dropping from the two French texts of the provision permitting (under proper safeguards) private monopolies.

[2] Brierly, *The Covenant and the Charter* (Sedgwick Memorial Lecture, 1946).

[3] The Nauru Trusteeship Agreement has the form of a condominium but without the substance. Article 2 provides: 'The Governments of Australia, New Zealand, and the United Kingdom (hereinafter called the "Administering Authority") are hereby designated as the joint authority which will exercise the administration of the Territory.' The Administering Authority as thus defined is 'responsible for the peace, order, good government and defence of the territory'. But it functions for this purpose through one of the three Governments, Australia, which, acting by agreement with the others, will 'continue to exercise full powers of legislation, administration and jurisdiction on and over the Territory' (Art. 4). This is a restatement of the arrangement in existence since the Tripartite Agreement of 2 July 1919. It has worked well, but Nauru is little more than a phosphate mine, and the three Governments belong to a common family under a common Crown.

Territory worked it was because it was a relatively simple problem and the Great Powers were sufficiently united to make it work. So far the experience of post-war condominiums in occupied territories, and the case of Trieste, do not give grounds for optimism—and the new Jerusalem is not yet.

We do not yet know how the defence provisions of Article 84 for ordinary trust territories and the defence provisions of strategic area trusteeships (Arts. 82–3) are going to work. Some of the African Trusteeship Agreements have a clause providing for a possible switch-over to strategic area trusteeships. Nor do we yet know the real significance of the new provision for 'periodic visits'.

The trusteeship Chapters begin with a political manifesto, drafted in the vague language of political platforms, and end with the more precise language of a legal document. If it was possible to say that the language of Article 22 of the Covenant was 'not legal or parliamentary in its phraseology, but conceived in a more emotional and more humanitarian strain', what are we to say of Chapters XI to XIII of the Charter?[1] Some of the undefined, emotionally charged words and phrases in Articles 73 and 76 mean diametrically opposite things to different peoples or are used as counters in political propaganda with their meanings inverted. What is meant by such phrases as 'not yet attained a full measure of self-government' (does it exclude those incapable by their circumstances of ever attaining a full measure?); or 'the interests of the inhabitants are paramount' (paramount to what?)? Other totally undefined phrases in quick succession are 'self-government'; 'well-being'; 'educational advancement' (whose measure?); 'just treatment' (as in a police state or a free democracy?); 'progressive development of free institutions'; 'good neighbourliness'; 'self-government *or* independence'; 'fundamental freedoms' (as conceived in a police state or elsewhere?); 'interdependence of peoples'; and many others—not forgetting 'states directly concerned'. So far such language has provided convenient ammunition for ideological warfare between the Powers without furthering the professed purposes of trusteeship.

This inflation of language is only part of the more general process of inflation which becomes visible when the two systems are compared. The trusteeship Chapters have more than twice as many words as Article 22 of the Covenant. One long Article is replaced by two Chapters with 17 Articles (besides the Declaration Regarding Non-Self-Governing Territories (Chapter XI) which also extends to trust territories). The Trusteeship Agreements are spelt out in greater detail than the mandates. The Trusteeship Council has 107 rules of procedure where the Mandates Commission managed its business with about a quarter of that number. The rules require each Government to forward 400 copies of its annual report, where the League asked for 100. Where the League 'B' mandates questionnaire had some 50 questions, the Trusteeship Council's Provisional Questionnaire contains 247 numbered paragraphs (many of them multiple questions), and a long statistical annex—in all a printed paper of 17 pages double-column folio. Where the League Mandates Section had a total staff of 10 in 1934 and 7 in 1938, the United Nations Secretariat Trusteeship Division in 1947 had 47.[1] Where the League Mandates Section's budget in a typical year (1934) was 224,924 Swiss francs, trusteeship in 1947 figured in the budget for at least ten times that sum.[2]

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[1] Fischer Williams, *Some Aspects of the Covenant of the League of Nations* (1934), p. 200.

If more words, more rules and formulae, more delegates, more officials, many more documents, and more money were the test, then trusteeship is bigger and better than the mandate system. The shifting of the main responsibility for action and the forum of discussion from the closed room of the Mandates Commission, and the narrow circle of the League Council to the amphitheatre of the General Assembly is responsible for part of the inflation. But this also is evidence of the far greater interest taken in matters relating to dependent areas in the United Nations than in the League. Ideological warfare may cost more money, require more officials, and produce more documents, but it is at least evidence of the interest taken in the issues and their political importance, though it may not have contributed noticeably as yet to 'the well-being of the inhabitants'. Yet the trusteeship system still has a smaller territorial foothold than the mandate system. It occupies ten of the original fourteen or fifteen mandates, with the first trusteeship of 'the Organisation itself' in sight in Jerusalem. But this will be the sole remaining foothold of trusteeship in the Middle East, which produced a large share of the mandate problems facing the League.

In terms of increased functions and activities the field of trusteeship is wider than that of mandates. In the matter of petitions the only real changes are the oral presentation of some petitions and the writing into the Charter of the custom of the League. Another informality of the League, co-operation with technical organs, is also written into the Charter. Article 91 provides for assistance of the Economic and Social Council and specialized agencies. These agencies are largely independent bodies and are dealing on a functional or broad regional basis with problems that the Trusteeship organs handle on a territorial basis. There is a real danger of overlapping that hardly existed under the more centralized system of the League.[3]

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[1] Trusteeship Division (1947), 47; Division of Information from Non-Self-Governing Territories, 43; Office of Assistant Secretary-General, 11.

[2] The total budget (1947) for the two divisions was 926,737 dollars.

[3] U.N. Docs. T. 50, 31 October 1947; and E.T./C1/1, 7 August 1947 (Report of Committee on Negotiations with Inter-Governmental Organizations).

The one important innovation in the matter of methods of international supervision is the provision for 'periodic visits to the respective trust territories at times agreed upon with the administering authority' (Art. 87 (*c*)). With varying turns of phrase the administering authorities have undertaken in their Trusteeship Agreements to 'facilitate any periodic visits [to Tanganyika] which they [the General Assembly and the Trusteeship Council] may deem necessary, at times to be agreed upon with the Administering Authority'. This important provision, which if skilfully used may increase the authority of the Trusteeship Council, begins to take shape in practice.[1] Under the Rules of Procedure it is the Trusteeship Council which defines the terms of reference of each visiting mission, which may 'act only on the basis of the instructions of the Council and shall be responsible exclusively to it' (Rule 96). The Trusteeship Council selects the members 'who shall preferably be one or more of the representatives on the Council' (ibid.). 'The Trusteeship Council may, in agreement with the Administering Authority, conduct special investigations or enquiries when it considers that conditions in a Trust Territory make such action desirable' (Rule 97).

As regards international machinery, the changes under the trusteeship system are important. The Trusteeship Council as established by the Charter is one of the Principal Organs of the United Nations. The Permanent Mandates Commission was one of the two special organs mentioned in the Covenant, but its functions were to advise the Council, and it had little or no direct power of initiative or action. The Trusteeship Council has been described by its President as 'a concentration of responsible power'. The mandatory Powers came into the Mandates Commission one by one as the accredited representative of each sat in with the Commission when the report of his Government was under examination. Nationals of the mandatories had to be a minority of the Commission. The Administering States sit in the Trusteeship Council as full members balanced by an equal number of countries not administering trust territories. The authority of the Council is increased by the provision that 'each Member shall designate one specially qualified person to represent it thereon'. Permanence of membership and the expert knowledge of the members was one of the main elements in the strength of the Mandates Commission.

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[1] The first visit was to Western Samoa in the summer of 1947. See Report of Mission to Trusteeship Council, Doc. T/46, 24 September 1947. See also Doc. T/78, 2 December 1947, for the new constitution of Western Samoa, drawn up by the New Zealand Government, to amend the Samoa Act, 1921. The Constitution provides for a Council of State; also a Legislative Assembly with an absolute majority of Samoans, and wide legislative powers. Reserved subjects are defence, external affairs, and title to Crown lands. The President of the Trusteeship Council, the Hon. Francis B. Sayre, who led the mission to Samoa, said: 'To the administering authorities such visits are bound to quicken the sense of their responsibility and accounting to the United Nations. To the Trusteeship Council, and especially to the members of the visiting missions, such firsthand contacts give tremendous vitality to the work and bring home, as nothing else could, the realities and the possibilities of the Council's tasks.' *The Advancement of Dependent Peoples*, Carnegie Endowment, 'International Conciliation', November 1947. The second visit was to East Africa in 1948 (Doc. T/P.V. 33, 1 December 1947). The General Assembly on 20 November 1947 adopted the recommendation of the Trusteeship Council that budgetary provision should be made for one visiting mission (covering possibly several territories) each year (U.N. Docs. A.498; T.72 (25 November 1947)).

The effect of the substitution of the General Assembly of the United Nations for the League Council as the organ responsible for trusteeship (other than strategic area trusteeships which are under the Security Council) is more difficult to assess. It is a unique sounding-board for the discussion of humanitarian issues, but also for political propaganda. In the Carnegie Endowment publication referred to above it is pointed out that 'the greatest danger which will be faced in the near future is the growing tendency to regard the discussion of colonial problems in the United Nations as another means of giving vent to fundamental political antagonisms'. That danger has been evident in the debates of the General Assembly with its large majority of Powers not responsible for the government of dependencies—though a number have depressed peoples within their metropolitan areas.[1]

Resolutions on trusteeship have to be carried in the Assembly by a two-thirds majority, but a simple majority suffices in the Trusteeship Council (which might be regarded as in a sense the executive organ of the Assembly). The Trusteeship Council being evenly balanced, the non-Administering Powers, in order to carry a proposal regarded by the Administering Powers as undesirable, would have to win over one of them. In the first Sessions of the Trusteeship Council, however, voting was on the merits of an issue. But in essence the powers of the General Assembly and Trusteeship Council are not much wider than those of the League Assembly and Council. Though the Charter speaks of decisions of the Assembly, 'Its decisions are not directives.'[2] The Assembly may recommend action, but not take it. The Trusteeship Council (or General Assembly) may 'consider' reports; 'accept' and 'examine' petitions; 'provide for periodic visits'; 'formulate' a questionnaire; 'adopt' rules of procedure. But as the British representative in the General Assembly emphasized, it cannot extend its powers by rules of procedure.[3]

These powers do not include any power of government or administration within a trust territory (except in the case of a territory administered by 'the Organisation itself' under Article 81).

It is the Administering Authority which is designated under Article 81 'to exercise the administration of the trust territory'; and it has sole power of government and administration in the territory. The Administering Authority is not an agent of the United Nations—if only because it meets deficits and pays for development. The 'agent' conception was pressed by several delegations but was rejected by the mandatory Powers and found no place in the Trust Agreements.[1]

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[1] The entire standard of living of many States, full Members of the United Nations, is lower than in a number of colonies, e.g. Malaya.

[2] Brierly, op. cit.

[3] U.N. Doc. A/C.4 SR 34, 29 September 1947.

The position as regards approval and amendment of a Trust Agreement was put thus by the United Kingdom delegate in the Fourth Committee: 'The Assembly has no power, of itself, to make amendments, but it would naturally be open to the Assembly to recommend any amendments which it would wish to see made before giving its approval.'[2] Neither the Charter nor the Trusteeship Agreements give the United Nations power to terminate a trusteeship, transfer a trust territory, or annul a trusteeship agreement.[3] A Sub-Committee of the General Assembly's Fourth Committee has recommended that the General Assembly instruct the Trusteeship Council to watch the operation of the Trusteeship Agreements. If in the Council's opinion some alteration or amendment would promote the more rapid achievement of the basic objectives of the system, it would submit such proposed alteration or amendment to the Administering Authority so that if agreed on, pursuant to Article 79, it could then be submitted to the General Assembly for approval.[4]

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[1] U.N. Doc. A/258, 12 December 1946. The article in the Trust Agreements designating the Administering Authority does not contain the phrase 'on behalf of the United Nations' which at one stage of the drafting was proposed by the United States but later abandoned.

[2] 4 November 1946.

[3] It was noted at the San Francisco Conference that the Charter contained no provision for 'termination of a trust or for its transfer from one administering authority to another. The views were expressed that there could be no compulsory transfer except as a consequence of a breach of the peace. . . .' (*U.N.C.I.O. Records*, vol. x, p. 506.) An amendment submitted by the Egyptian delegate to empower the General Assembly 'to terminate the status of trusteeship, and declare the territory to be fit for full independence, either at the instance of the administering authority or upon the recommendation of any member of the Assembly' was rejected. It was agreed not to make special provision for termination or transfer of a trust in the event of its violation, or of withdrawal from the United Nations. The Rapporteur's Report records a joint United States/United Kingdom statement as to penalties under the Charter for aggression or withdrawal for valid or discreditable reasons and its possible effect on an administering authority (*U.N.C.I.O. Report of the Rapporteur of Committee II/4*, Doc. 115, II/4/44(1) (a)).

The process of termination has differed for each of the mandates. Iraq (1932): by Treaty in agreement with the League Council. Syria and Lebanon: by Free French proclamations of 8 June, 28 September and 26 November 1941; by subsequent piecemeal recognition by various Powers; by admission as original Members of the United Nations (independence was confirmed by the Anglo-French Agreement of 13 December 1945). Transjordan: in the Treaty of 22 March 1946 the United Kingdom recognized Transjordan as 'a fully independent State'; the preamble of the Treaty noted that the United Kingdom had 'formally declared in the General Assembly of the United Nations Organization that they intend to recognise the status of Transjordan as a sovereign independent State'. In the case of Transjordan, Syria, and Lebanon, termination of the mandate occurred without any active intervention by the League or the United Nations. On the other hand, the situation arising from the laying down voluntarily by the United Kingdom of its mandate in Palestine formed the subject of prolonged discussions in the United Nations General Assembly in 1947. For the 'Plan of Partition with Economic Union' and United Nations trusteeship for Jerusalem see Report of the *ad hoc* Committee on the Palestinian Question, Doc. A./516, 25 November 1947.

[4] U.N. Doc. A/258, 12 December 1946.

New policies of trusteeship. The most important changes made by the Charter were not in matters of machinery but in what might be called the policies of trusteeship. These changes affected the ultimate political goal of a trust territory, fundamental policy in the matter of defence, and the application of the 'open door' principle.

2 *The political goal.* The political goal was restated by the Charter in a formula which, while still vague, was at least more definite than the Covenant. The Covenant was silent on 'B' and 'C' mandates but referred to 'A' mandates as 'provisionally' 'independent nations'. But the Mandates Commission seemed to work on the assumption of ultimate independence (even if remote) for all mandates. The Charter's formula (Art. 76) is 'progressive development towards self-government or independence'. But this is made subject to (1) 'the particular circumstances of each territory and its peoples'; (2) 'the freely expressed wishes of the peoples'; (3) 'the terms of each trusteeship agreement'. This is a more constructive formula than the principle of multiplying sovereignties to which League mandate theory seemed wedded. Self-government is compatible with complete political union or federation with the trustee state. The Charter goes on to put amongst the basic objectives 'the recognition of the interdependence of the peoples of the world'.

The Trusteeship Agreements have repeated or applied the formula without change. The United States draft trusteeship agreement stopped at 'self-government'. The United States agreed to a Soviet amendment in the Security Council to use the full phrase of the Charter, including 'independence'. In accepting this modification the American delegate recorded the opposition of the United States 'not to the principle of independence, to which no people could be more consecrated . . . but to the thought that it could possibly be achieved within any foreseeable future in this case'.[1]

3 *The Open Door.* The principle of the absolute 'open door' embodied in the 'A' and 'B' mandates is subordinated by the Charter and Trust Agreements to the interests of the inhabitants. The 'open door' in its absolute form was a relic of the period which produced the 'inequal treaties' in China. The Charter provides (Art. 76 (*d*)) that 'equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals' (and also for the latter in the 'administration of justice') shall be 'without prejudice' to 'political, economic, social and educational advancement of the inhabitants of the trust territories' as well as the other basic objectives. This is an important change which gives the Administering Authority much more freedom of action to safeguard the interests of the population which may coincide in certain cases with its own interest. This modification made it possible to extend the principle

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[1] U.N. Doc. 8/P.V./116, 7 March 1947.

of the 'open door' to the former 'C' mandates to which it was not applied by the Covenant. Whereas the African Trusteeship Agreements work out in some detail the application of the 'open door', those in the Pacific merely apply the provision of the Charter. The United States Trust Agreement modifies the application of the 'open door' by taking advantage of the limitations contained in the two 'strategic area' Articles (82 and 83) which the United States was instrumental in having inserted in the Charter. These are the overriding factor of security and the application of the 'basic objectives' only to 'the *people* of each strategic area', i.e. not to foreign nationals. This second limitation slipped through without comment in the hasty drafting at San Francisco. Article 8 of the American Trust Agreement therefore gives 'most-favoured-nation rather than national treatment' to the nationals, companies, and associations of other United Nations.[1] In other words, American nationals enjoy preference. The Security Council accepted this clause. The American representative in explaining it pointed out that it was 'dictated by the fact that these islands are proposed as a strategic trusteeship area'. He added that 'the United States Government has no intention . . . of taking advantage for its own benefit, and to the detriment of the welfare of the inhabitants, of the meager and almost non-existent resources and commercial opportunities that exist in the scattered and barren islands'.[2]

Defence and security. The most important of all the modifications in mandate theory made by the Charter lies in the realm of defence and security. The Covenant (following a nineteenth-century tradition of neutralization and demilitarization for arrangements in zones of the international frontier) forbade 'fortifications or military and naval bases'. The Charter, on the other hand, in effect made them a duty. The first sentence of Article 84 says: 'It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security.' The second sentence of the Article permits the Administering Authority to use for this purpose, as well as for local defence, 'volunteer forces, facilities and assistance from the trust territory'.[3] The African Trusteeship Agreements and that for Western Samoa spell this out in such further detail as the establishment of naval, military, and air bases, the erection of fortifications, the stationing and use of armed forces in the trust territory, as well as the use of volunteer forces, facilities, and assistance.[4]

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[1] Explanatory comments on the U.S. Draft: *State Dept. Bull.* 9 March 1947, p. 421.

[2] Ibid., 9 March 1947.

[3] The second sentence of Article 84 reads: 'To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.'

[4] The objection of the U.S.S.R. and other delegations that the trusteeship agreements were

The American strategic area Trust Agreement uses exactly the same phraseology, based on Articles 84 and 76 (*a*), as the non-strategic area agreements. And, in addition, it relies, of course, on the two Articles of the Charter specially designed to cover a strategic area agreement, namely, Articles 82 and 83. From a practical point of view Articles 82 and 83 were amongst the most important in the Charter but also perhaps the vaguest and most obscure. No trust agreement goes anything like as far as does the American Pacific Islands Agreement in defining, clarifying, and expanding the text of the Charter. The Agreement designates the entire 'Territory of the Pacific Islands' as a 'strategic area'. The American delegate in his statement to the Security Council on 26 February 1947 emphasized the 'tremendous strategic value' of the islands which 'constitute an integrated strategic physical complex vital to the security of the United States'.[1] The territory would be included, he indicated, under agreements made with the Security Council under Article 43 for the maintenance of international peace and security. The Trust Agreement went beyond the requirements of the Charter in providing for annual reports, petitions, visits, and questionnaires in respect of the territory except in so far as supervision by the United Nations might be limited by the administering authority at its discretion in areas closed for security reasons (Art. 13).[2]

The trusteeship system is a compromise between the two extremes of war-time theorizing as to the future of the mandate system. One extreme theory was that it should be abolished; the other (which found support in Washington, Canberra, and Wellington) was that it should be extended to all dependent areas. The compromise adopted in the Charter was to strengthen somewhat international supervision, and to eliminate some of the main defects revealed in the working of the mandate system, rather than to extend the trusteeship system to fresh areas (other than a possible crop of new ex-enemy territories from the Second World War). The second element in the compromise was the Declaration Regarding Non-Self-Governing Territories (Chapter XI of the Charter), inserted in the Charter on the initiative of Great Britain and Australia. The Declaration applies to all 'territories whose peoples have not yet attained a full measure of self-government', including trust territories. As the British Commentary

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not in conformity with the Charter because they did not provide for the Security Council's approval of military arrangements in the trust territories was not sustained by the General Assembly. The latter took the view that the Security Council's role is confined to strategic areas designated in strategic area trusteeships under Arts. 82 and 83. The reference to the Security Council in Art. 84 leads back to Art. 43 which provides for subsequent agreements as to armed forces, &c., to be made available to the Security Council.

[1] *U.S. State Dept. Bull.* 9 March 1947.

[2] The United States Government formally notified the Security Council that from December 1947 the Eniwetok Atoll was 'closed for security reasons' for 'experiments relating to nuclear fission' and that 'periodic visits . . . are suspended'. The inhabitants of the atoll would move to new homes. U.N. Doc. S/613, 2 December 1947.

on the Charter points out, 'The Chapter prescribes the principles of Colonial Administration. . . . It does not empower the United Nations Organization to intervene in the application of these principles by the Powers concerned.'[1] The Chapter consists of a statement of general obligations recognized by colonial Powers towards the inhabitants of their territories, with one specific obligation towards the United Nations, namely

> 'to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories. . . .'

This provision (together with the provision in Art. 77 (1) (*c*) for the voluntary submission of territories to trusteeship) has provided a foothold in the United Nations for a persistent effort by a group of Powers to break down the fundamental distinction made in the Charter between national and international trusteeship. It is not possible to discuss this aspect here beyond pointing out that it is fundamental to an understanding of the marked difference between mandates under the League and trusteeship under the United Nations. For the difference between the two systems is not so much one of law as of political circumstances and atmosphere. The primary emphasis of the mandate system, as shown in its day-to-day working, was on the welfare of the inhabitants of the territories. The Mandates Commission, the League Council, and the Secretariat were successful on the whole in keeping mandates out of politics. In the General Assembly of the United Nations, with the notable exception of the Palestine issue, trusteeship and non-self-governing territories have provided a battleground for political warfare. But the system has been established. It has begun to operate. The Trusteeship Council in its first sessions has carried forward the best traditions of the Permanent Mandates Commission and the League Council whose roles it inherited.

[1] Miscellaneous No. 9 (1945), Cmd. 6666.

INTERNATIONAL ORGANIZATION AND NEUTRALITY

By J. F. LALIVE, M.A., LL.D.

I. *General*

The purpose of the present article is to consider how far neutrality as part of international law can continue to exist in, and be compatible with, an organized international society. The experience gained from the League of Nations serves to throw light on this problem in relation to the United Nations.

The term 'international organization' must for present purposes be taken as meaning a system for the organization of peace, to which the well-known expression 'collective security' is generally applied. This latter term has gradually become a term of art in international law, although it is rarely found in treaties.[1] In law, collective security implies a system of obligations by which states guarantee one another against an attack made by force on their independence and territorial integrity.[2] The adjective 'collective' makes it clear that the attainment of true security implies the acceptance of such obligations by all states, or at least by a large number of them sufficient to amount to quasi-universality. Both systems of collective security which have been set up in recent years, namely, the League of Nations and the United Nations, comply to a great extent with the above definitions.

Neutrality, on the other hand, is an old-established conception in international law. In its traditional meaning it connotes, first, a state of fact—'two nations at war and a third in friendship with both'.[3] Occasionally it denotes a principle of foreign policy. It may also mean a legal status involving certain rights and duties. Starting from these definitions, and considering *in abstracto* a system in which war is unlawful and exposes the offender to sanctions from other states, it may be said that collective security and neutrality are incompatible: 'the more there is of the one, the less there is of the other'.[4] This statement, though theoretically correct, does not necessarily correspond to the reality, which is less definite and more complex.

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[1] The United Nations Charter speaks of 'international security' in several Articles (cf. Arts. 1, 2, 11, 12, 15, 18, 24, 26, 33, 34, 37, 38, 42, 43, 47, 48, 51, 52, 54, 73, 76, 84, 99, 106). Art. 1 states that to 'maintain international peace and security' the Organization must 'take effective *collective* measures . . .'. Certain treaties concluded between the two World Wars use the expression 'general security' (cf. League of Nations, *Treaty Series*, vol. cxlvii, p. 67; vol. cxlviii, p. 213).

[2] See Lauterpacht, 'Neutrality and Collective Security', in *Politica*, 2 (1936), p. 133; Politis, Memorandum on Security Questions, League Documents C.A.S. 10, No. 53.

[3] Moore, *Digest of International Law*, vol. vii (1906), p. 860.

[4] Lauterpacht, loc. cit., p. 149. This view is upheld by a number of lawyers, for instance, Politis, *Neutrality and Peace* (1935); Quincy Wright in *American Journal of International Law*, 34 (1940), pp. 391 ff.

Before the Second World War, international lawyers considered the problem of neutrality in regard to an existing system of security, embodied in an international convention, to wit, the Covenant of the League of Nations. The effect which another system, that of the United Nations, may have on the existence and content of neutrality now calls for consideration. In the Second World War almost all states were participants, and of those who took refuge in neutrality few found salvation in it. As a consequence, in the minds of many, the concept and the very word neutrality have fallen into discredit. Neutrality is deemed by belligerents to be a synonym for egoism and indifference, whether regarded as a principle of policy or as a legal status; and they have almost always criticized it and treated it harshly. More recently it has become a target for statesmen and international lawyers, who see in it an obstacle to solidarity, to international organization, and to the formation of a society of states founded on respect for, and enforcement of, law. However, it is necessary to consider the matter more closely from the point of view of the present legal position.

Under a system of collective security there may be different methods and degrees in the prohibition of war and in the measures of compulsion applied to ensure respect for this prohibition.

(*a*) *Prohibition of recourse to armed force.* This prohibition may be general or special. In other words, all wars, or only certain wars, may be forbidden.

(*b*) *Various measures of compulsion.* Practice and theory agree in recognizing three different classes of compulsive measures: (i) moral compulsion alone;[1] (ii) compulsion not involving the use of armed force (such as breaking off of diplomatic relations, economic and financial sanctions, &c.);[2] (iii) physical compulsion by the use of armed force.[3]

(*c*) *Methods of applying measures of compulsion.* For the consideration of this matter it is necessary to examine two questions: (1) what states shall be bound to apply the measures of compulsion; (2) to what extent shall the measures be applied automatically?

1. *Extent*, ratione personae, *of a state's obligation to take part in measures of compulsion.* The authors of the Covenant started from the idea that all Members of the League were equally bound to participate in sanctions. The exemption granted by the Council to Switzerland in 1920, whereby that country was permitted not to participate in the military measures taken by the League, was looked upon as an exception confirming the rule.

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[1] E.g. the General Treaty for the Renunciation of War, 1928.

[2] Cf. Art. 16, para. 1, of the Covenant; Art. 41 of the Charter.

[3] Cf. Art. 16, para. 2, of the Covenant; Art. 42 of the Charter.

However, experience was to show that it was not possible to apply a uniform rule to all states, and that the extent of their participation in measures of compulsion decided on by the community of states had to be graduated according to the ability of each state. A certain elasticity was necessary. This was introduced by the League, in 1921, in the interpretation given to Article 16 of the Covenant.[1] There is still more elasticity in the mechanism of the Charter, as will be seen below.[2]

2. *Extent to which measures shall be applied automatically.* Here, too, there are different degrees of collective security. The mere fact that one member of the system of collective security wages an unlawful war against another member might automatically involve the application of the machinery of sanctions. Or each state might be left to judge, in the full exercise of its sovereignty, whether it should or should not apply measures of compulsion.[3] Or the decision to enforce the obligation might be entrusted to a central body, distinct from the Member States.

It is clear from the foregoing that, both in theory and in practice, there was room left for neutrality within the two international organizations that have existed since 1919. It must also be borne in mind that a characteristic element of the League's system, and of that of the United Nations, is that both aim, to a great extent, at the maintenance of the territorial and political *status quo* resulting from the wars and the peace treaties. The victors desired to protect themselves against a possible reaction on the part of the vanquished. There is thus an element of alliance in both the Covenant and the Charter.[4] Again, the position of the five Great Powers in the Charter, and the requirement that they should be unanimous, tend in some respects to constitute an alliance directed against the vanquished. The League did not establish such a definite 'hierarchy' of states; but none the less the 'veto' of a Great Power would have been as effective in the League as it is in the United Nations (for unanimity was required for any decision of substance taken by the Council of the League).

II. *The League of Nations and neutrality*

A brief survey of the position of neutrality within the League, historically the first system of collective security, may be of assistance in assessing the legal position under the Charter.[1] The main reasons why the system of collective security set up by the Covenant of the League did not do away with neutrality may be summarized as follows:

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[1] See *infra*, p. 76.

[2] See *infra*, pp. 80 ff., and the discussion on Arts. 43, 48, and 52 of the Charter.

[3] This was the result reached by the interpretation given by states to Art. 16 of the Covenant. Each state remained free in every case to decide whether Art. 16 was applicable or not. Cf. in particular Jessup, *Neutrality To-day and To-morrow* (1936), p. 115; Ray, *Commentaire du Pacte de la Société des Nations* (1930), p. 512. It is clear that such an interpretation left a wide margin for neutrality.

[4] See Rappard, 'The United Nations from a European Point of View', in *Yale Law Journal*, 55 (1946), p. 1040.

1. *Non-universality of the League.* The effect of this was twofold. On the one hand, entire freedom was given to third states to decide upon the attitude to be adopted in case of war. On the other hand, the absence of several Great Powers, and especially of the United States, weakened the whole system and gradually brought about the revival of the idea of neutrality within the community of nations.[2]

2. *The Covenant prohibited only certain wars.* The Covenant did not prohibit all, but only certain, wars. The distinction between lawful and unlawful wars depended on the observance of an agreed procedure, and not on the nature of the issue underlying the wars. Thus a war of aggression might in some cases have been lawful, and in such a case neutrality would have been admissible.

3. *The nature of the sanctions provided for in Article 16 of the Covenant.* The Covenant distinguished (as does the Charter) between the military and non-military measures which other Member States might take against a state violating its obligations under the Covenant. Thus there arose the delicate question of *differential* or *qualified* neutrality, which produced much discussion and controversy between the two wars. The idea underlying qualified neutrality is that the impartiality required to constitute neutrality is chiefly concerned with the *military* aspect of the situation. Accordingly, equality of treatment, conceived as a duty of the neutral towards the belligerents, would not apply to non-military matters. A state would thus be allowed to maintain its neutrality while participating in other measures, principally economic, against a state guilty of aggression.[3]

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[1] The following are some of the principal works devoted wholly or partly to the question of neutrality and collective security under the League Covenant: Whitton, 'La Neutralité et la Société des Nations', in *Recueil des Cours de l'Académie de Droit international de la Haye* (1927); Morel, *La Neutralité de la Suisse et la Société des Nations* (1931); Haase, *Wandlung des Neutralitätsbegriffes* (1932); Michaïlides, *La Neutralité et la Société des Nations* (1933); Politis, *La Neutralité et la Paix* (1935); Bourquin (Editor), *Collective Security*, chap. iv: Neutrality (1936); Jessup, *Neutrality—To-day and To-morrow* (1936); Waldkirch, *Neutralitätsrecht im Landkriege und Seekriege* (1936); Bottié, *Essai sur la Genèse et l'Évolution de la Notion de Neutralité* (1937); Astorg, *La Neutralité et son Réveil dans la Crise de la Société des Nations* (1938); Cohn, *Neo-Neutrality* (1939); Birr, *Fortune et Infortune de la Neutralité* (1939); Maffert, *L'Évolution de la Neutralité de 1914 à la Guerre de 1939* (1943); Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1940), §§ 292*b* ff.

[2] In the early days of the League neutrality had been condemned in no uncertain terms. In 1920 the Council of the League declared that 'The idea of neutrality of Members of the League is not compatible with the other principles that all the members of the League will have to act in common to cause their covenants to be respected' (League of Nations, *Official Journal*, September 1920, p. 308).

[3] This was the argument maintained by the Swiss Government, permitting the entry of Switzerland into the League of Nations in 1920. Cf. Message of the Swiss Federal Council of 4 August 1919 (printed in Huber, 'Die schweizerische Neutralität und der Völkerbund', in Munch, *Les Origines et l'Œuvre de la Société des Nations*, vol. ii (1924), pp. 103 ff.). This view was

These questions need not be discussed here in detail. As regards Member States of an international organization, the prevailing opinion seems to be that a state may agree by treaty not to insist on the observance by other states of neutral duties towards it. Accession to the League Covenant therefore meant that a Covenant-breaker disclaimed in advance the right to demand the strict observance by another state member of the rules of impartiality.[1] Differential neutrality has never been put to the test. It is therefore difficult to express an opinion on its merits or defects. Its main advantage lies in its elasticity and in the possibilities which it offers of adapting the policy of states to varying situations. Admittedly, the elasticity may work both ways. For states may make use of this flexible formula in order to evade responsibility in a system the purpose of which is to prohibit recourse to war and to support this prohibition by penalties. This consideration is intimately connected with the major political problem of which the so-called neutral states were particularly conscious. If a legal system, such as that established by the Covenant and the Charter, is in principle applicable in the same measure to all members, it can operate only with considerable difficulty. For the position of each state is different; the risks it runs and the advantages it may secure will seldom be the same as in the case of other states. For the same reason any analogy, such as jurists are tempted to draw, from the working of municipal law may be misleading. It may therefore be idle to endeavour to impose the same obligations upon all states. After a world war the victorious states, like most others, are desirous of participating in a new international organization. It does not follow that, when the time comes, they will all be equally ready to take up arms against a disturber of the peace.[2] How, then, is it possible, within a system which is still based on the idea of state sovereignty, to reconcile this almost biological desire of states to take up arms only in cases that are of direct and immediate interest to themselves, with the efficiency of a machine for repressing recourse to war?[3] In 1921 the League of Nations agreed that a state might be excused from taking part in sanctions, even if it shared the opinion of other Members that the

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criticized, especially by German writers. For a study of this question see Guggenheim, 'Die schweizerische Neutralität und Art. 16 der Völkerbundsatzung', in *Zeitschrift für öffentliches Recht*, 7 (1928), pp. 267 ff.

[1] 'There is in the established notion of neutrality as an attitude of absolute impartiality, nothing so sacrosanct or fundamental as to make its anticipatory modification by treaty repugnant in the slightest sense to international law': Lauterpacht, loc. cit., p. 142. Cf. also Guggenheim, 'La Sécurité collective et le Problème de la Neutralité', in *Annuaire suisse de droit international*, 2 (1945), pp. 21 ff. These two authors in particular quote a number of international lawyers of the eighteenth and nineteenth centuries, and several historical examples, to show that views on the subject of impartiality have frequently fluctuated. See also Lauterpacht's edition of Oppenheim, op. cit., vol. ii (1940), §§ 305 ff.

[2] Cf. Bourquin, *Vers une Nouvelle Société des Nations* (1944), p. 124.

[3] In *Collective Security* (1936), edited by Bourquin, this problem is thoroughly discussed; the arguments there set out have lost but little of their value during subsequent years.

Covenant had been broken.[1] In this respect the Charter of the United Nations is probably superior to the Covenant in that it permits of account being taken of the essential differences between states and that it does not impose rules of inflexible rigidity.

III. *The United Nations and neutrality*

In deciding how far the system of collective security set up by the Charter of the United Nations is compatible with neutrality, a distinction must first be made between the position of Member and Non-Member states. In dealing with the first class of states it is necessary to consider (*a*) the different situations in which an act of aggression or other breach of the peace does not technically constitute a violation of the Charter, and (*b*) the cases in which some Member States may adopt an attitude of complete abstention or one of qualified neutrality.

1. *General provisions of the Charter.* Article 2, paragraph 5, of the Charter reads as follows: 'All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.'[2] In the discussions on this paragraph at the San Francisco Conference the French delegate proposed that it should be made clear that membership of the Organization involved undertakings incompatible with the status of neutrality. This amendment, which was intended as an addition to paragraph 5 above quoted, was as follows: 'sans qu'un État puisse, pour s'y soustraire, invoquer un statut de neutralité'.[3] In support of his proposal the French delegate explained that by 'status of neutrality' he meant a status of permanent neutrality. The discussion that ensued showed that delegates agreed that the status of permanent neutrality was not compatible with the principles contained in Article 2, paragraph 5, inasmuch as a state must not invoke its status of permanent neutrality in order to escape from the obligations of the Charter. The sub-committee, on that understanding, tacitly accepted that the vote taken on that paragraph covered the French amendment.[4]

It is interesting to note that the French amendment, in the view of its author, related only to the status of permanent neutrality, whereas the text of the draft amendment would seem to be wider and to cover all possible cases, whether of occasional or of permanent neutrality. The object of this proposal was no doubt the desire to provide an absolutely watertight system of collective security, which would have rendered impossible special situations such as Switzerland had obtained in the League of Nations.[1] In regard to occasional neutrality, it is understandable that the French delegate, in his explanations, should have left this question on one side. For such neutrality remains possible in a fairly large number of cases, as will be seen below. In any case, the amendment as drafted was somewhat vague. This explains the interpretation, given by some writers,[2] to the effect that the non-adoption of the French amendment was probably due to the fact that the Charter in several cases admitted of neutrality.

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[1] Resolution 9*b* of the Second Assembly of the League of Nations, 1921. See also Guggenheim in *Annuaire suisse de droit international*, 2 (1945), p. 16; Lauterpacht, loc. cit., pp. 136 ff.; *Collective Security*, p. 428.

[2] The text corresponds to paragraphs 5 and 6 of Chapter II of the Dumbarton Oaks Proposals.

[3] 'Without it being possible for a State to escape such an obligation by relying on a status of neutrality': Documents of the United Nations Conference on International Organization, San Francisco, 1945: U.N.C.I.O., vol. vi, Doc. 944, p. 459.

[4] Ibid., p. 460.

The two principles contained in Article 2 (5) find their practical application in Chapter VII of the Charter (action with respect to threats to the peace, breaches of the peace, and acts of aggression). The general obligations incurred by Member States under the terms of this Article may seem clearly to denote a departure from the idea of traditional neutrality.[3] But it must be remembered that this provision appears in Chapter I, 'Purposes and Principles'. To understand and interpret it, it is necessary to examine how it fits in with the machinery set up by other chapters of the Charter. The positive obligation to give assistance to the United Nations derives its importance from the special provisions of Chapter VII. On the other hand, the negative obligation (not to give assistance to the Charter-breaking state) is more general and would seem to apply even to those Member States which, for one of the reasons to be considered later, would not be bound to assist the Organization. It is, however, clear that the word 'assistance' still needs to be defined.[4]

2. *The role of the Security Council.* The most important part of the machinery of security set up by the United Nations is the Security Council. It is that Council which, in accordance with Article 24 of the Charter, assumes 'primary responsibility for the maintenance of international peace and security'. This provision is completed by Article 25, which lays down that Members 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. A striking feature which distinguishes the Charter from the Covenant of the League is found in two elements which may be called 'centralization' and 'hierarchization'. *Cen-*

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[1] Cf. Goodrich and Hambro, *Charter of the United Nations*, Commentary and Documents (1946), p. 81.

[2] Guggenheim, in *Annuaire suisse de droit international*, 2 (1945), p. 32.

[3] This applies *a fortiori* to the following passage in the Preamble: 'We, the peoples of the United Nations, determined . . . to *unite* our strength to maintain international peace and security. . . .' It may be mentioned here that the two complementary principles of Art. 2, para. 5, of the Charter had no counterpart in the Covenant of the League of Nations.

[4] See *infra*, p. 83.

tralization implies that it is for a central organ to take the necessary decisions and steps to ensure peace and security, whereas under the League system each state was free to decide, in full sovereignty, whether or not the Covenant had been violated and to draw the practical conclusions. *Hierarchization* implies that the hegemony of the Great Powers was recognized *de jure*, and they were given a privileged position,[1] whereas the Covenant made no distinction in law as regards voting power between the Great Powers and the others. The provision of Article 27, which has improperly been called the 'right of veto', really signifies that any decision on questions of substance must secure the unanimous agreement of the five permanent members of the Security Council. This aspect of the question is bound to have considerable influence on the survival of neutrality within the new system. In fact, it has been suggested that unanimity of the five Great Powers is likely only in cases of a minor conflict which is geographically circumscribed.[2]

3. *Specific provisions of the Charter.* We may now examine the different types of cases in which it may be possible for a State Member to maintain an attitude of abstention in a dispute between two other Member States.

(*a*) '*Determination*' *provided for in Article 39.* According to the terms of Article 39, the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression. This 'determination' must be made in accordance with the provisions of Article 27, i.e. by a majority of seven votes, including the concurring votes of the five permanent members. Thus failure to secure the necessary number of votes in the Security Council in a particular case would render possible a continued status of neutrality on the part of third states without involving any technical violation of the Charter.

(*b*) '*Measures*' *referred to in Article 39.* This Article also provides that the Security Council shall 'decide' what measures shall be taken to maintain or restore international peace or security. These measures are those set out in Articles 41 and 42, the first of which relates to what may be called the 'non-military' sanctions, and the second to 'military' sanctions. This machinery is different from that of the League in one important respect. It is no longer for individual states, as it was under the Covenant, to decide separately by themselves if sanctions should be applied. A central organ is given jurisdiction to take the decision on behalf of the Member

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[1] According to Art. 27 of the Charter, decisions of the Security Council, except on procedural matters, shall be made by an affirmative vote of seven members (out of eleven), including the concurring votes of the five permanent members (China, France, United Kingdom, United States of America, and U.S.S.R.).

[2] See, for example, Colombos, 'The United Nations Charter', in *International Law Quarterly*, 1 (1947), pp. 28–9.

States, with an effect binding upon them. In strict law it would seem that the effect of this greater centralization of the machinery of enforcement is likely to result in a diminution of the freedom allowed to individual states. Without violating the Charter, the latter could not oppose the measures decided on by the Security Council, or even abstain from participating in them. This is clearly an attempt to strengthen the machinery for security, by concentrating it in the hands of a smaller and therefore more effective body. On the other hand, it must be borne in mind that the machinery of the Security Council can only be set in motion by the combined action of the five Great Powers. It is evident that no Great Power will ever consent to measures being taken against itself; or, probably, against a state with which it has close connexions.

(i) *Measures not involving the use of force.* Article 41 provides that 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decision'. These measures are specified as including 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'. This implies a centralization greater than that of the League. The Security Council may 'call upon' the Members to apply such measures. The provision is clearly mandatory, as in Article 40.[1] The non-military measures do not in themselves involve an act of belligerency. This is the purpose of the distinction between Articles 41 and 42. The resulting position may be one of qualified neutrality. The state affected by these measures cannot legally complain of being the victim of an unfriendly act, nor could it legally adopt measures of retaliation. By its acceptance of the Charter it has in anticipation acquiesced in such measures.

(ii) *Measures involving the use of force.* On the other hand, the 'action' which the Security Council may take, in accordance with Article 42, depends on agreements which it must negotiate with Member States. In virtue of Article 43 the object of these agreements is to make available to the Security Council armed forces, assistance, and facilities, including rights of passage, necessary for the maintenance of international peace and security. Although Member States are bound by Article 43 to make the 'armed forces' and 'facilities' available, it is probable that, failing such agreements, these states are not obliged to take part in the application of measures of coercion involving the use of armed force against an aggressor.[2]

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[1] The English expression 'call upon' is more imperative than the French term *invite*, which suggests freedom of choice.

[2] See Eagleton, 'The United Nations: Aims and Structure', in *Yale Law Journal*, 55 (1946), p. 993. Although Art. 44 provides that a state not represented on the Security Council shall participate in decisions concerning the employment of its contingent, it is none the less true that a decision might be taken contrary to that state's wishes: '. . . while it [the non-member of the

This view finds some confirmation in the terms of Article 106, which provides that in default of the special agreements mentioned in Article 43 the Great Powers shall take such joint action on behalf of the Organization as may be necessary for the purpose of maintaining peace. They may also associate other states, with their consent, in these measures. Article 106 provides that the five Powers shall, as occasion requires, consult 'with other Members of the United Nations with a view to such joint action on behalf of the Organisation as may be necessary for the purpose of maintaining international peace and security'. But the very use of the term 'consult' suggests that the Council does not take any binding decision. Article 2 (5) seems to be applicable here, inasmuch as the five Powers will act 'on behalf of the Organisation'. However, the more specific obligations under Article 25 and Chapter VII cannot be considered as applicable seeing that these provisions refer only to formal decisions of the Security Council.[1] In the case of Article 106 of the Charter the position would be similar to that under Article 16 of the Covenant of the League: the States Members would be free to take part in the application of sanctions. Thus it is clear that, under Article 106, even given the unanimity of the Great Powers, the other states would enjoy complete freedom of action, including the right to remain neutral.

(*c*) *Self-defence.* The right of legitimate defence is expressly reserved in Article 51 of the Charter. However, although it is characterized as 'inherent',[2] its scope is somewhat limited. It may be exercised until the Security Council has taken the measures necessary to restore peace and security. As most wars begin under a pretext of self-defence and as the San Francisco Conference gave no definition of aggression, preferring to leave full freedom of action to the Security Council,[3] there arises, once more, the difficulty connected with the voting procedure within the Security Council. The mere failure to obtain a majority of seven votes, or the opposition of a single Great Power, is sufficient to enable the 'defensive' war to follow its

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Security Council] is allowed to take part in the voting, its affirmative vote will not be necessary to a decision binding upon it according to the terms of Article 25': Goodrich and Hambro, op. cit., p. 167. It has been observed that, in this way, the Security Council might 'commit any country which is not a permanent member of the Security Council to war-like acts without its (this country's) desire or declaration of war': Possony, 'Peace Enforcement', in *Yale Law Journal*, 55 (1946), p. 939.

[1] See Goodrich and Hambro, op. cit., p. 288.

[2] On the meaning of the word 'inherent' and on the whole question see a remarkable article by Kelsen, 'Limitations on the Functions of the United Nations', in *Yale Law Journal*, 55 (1946), p. 1008.

[3] In the Report of M. Paul-Boncour, rapporteur to Committee III of the San Francisco Conference (Enforcement Arrangements), it was stated that 'a preliminary definition of aggression went beyond the possibilities of this Conference and the purposes of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression. It may be noted that, the list of such cases being necessarily incomplete, the Council would have a tendency to consider of less importance the acts not mentioned therein; those omissions would encourage the aggressor to distort the definition, or might delay action by the Council.' See U.N.C.I.O., vol. xii, Doc. 881, III/3/46, p. 505.

course without any technical violation of the Charter. Here again other Member States can maintain their neutrality.

Furthermore, the Charter permits not only individual self-defence but also collective self-defence. A group of states might take action when any member of the group is the object of an armed attack. It has been suggested that the wording of this provision does not exclude action being taken, whether on the basis of a limited agreement or on the basis of common interest in meeting a common danger.[1] In this case, too, there would be no obligation on other Members to abandon their neutrality.

(*d*) *Regional arrangements*. A certain decentralization of the mechanism of collective security is assured by Chapter VIII of the Charter, which seeks to reconcile the existence of regional security arrangements with the principle—on which the Charter is based—of the common interest of all states in the maintenance of peace.[2] Such provisions are useful in that they make allowance for the existing imperfections of international organization and obviate the criticism—occasionally levelled against the League of Nations—that collective security tends to make every war universal instead of keeping it localized. That system put forward solutions which were too rigid in so far as they under-estimated the diversity of states and the differences in their geographical position, their economic and military potential, and their interests. Such a criticism could hardly be applied to the United Nations Charter, in view of its Chapter VIII. That chapter supplies a corrective to the conception of the indivisibility of war and leaves scope for degrees of neutrality. States which do not take part in the settlement of a dispute (i.e. states which do not form part of the regional organization) are given the right to adopt an attitude of abstention towards states involved in the dispute. It may even be their duty to abstain. For Article 53 states that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council'. Thus, once more, the decision rests with the Security Council. If it considers that such 'enforcement action' will be of a strictly regional nature, it is difficult to see how other states could, except with the Council's consent, adopt any other attitude than that of abstention. The Security Council may also decree measures affecting states which are not parties to the regional agreement, in order to avoid giving assistance, within the meaning of Article 2, paragraph 5, to the Charter-breaking state. This will depend on circumstances.

(*e*) *Exemption from collective measures, granted to certain states*. It has already been observed that much freedom of action is allowed in the application of the measures provided for in Chapter VII of the Charter in the case of a threat to peace. Article 48 lays down: 'The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.' This is an important provision which gives rise to several questions, some of which must be considered here. First, what is the nature of the exemption? Can it be maintained that it will never be absolute, since the exempted state remains subject to Article 2 (5)? This is probable, but it will be for the Security Council to decide on the extent of the exemption.[1] Secondly, the term 'assistance' requires definition.[2] Can normal economic relations be assimilated to assistance? This depends again on the circumstances. In any case, a state cannot rely upon the existence of a commercial agreement as a pretext for evading an obligation to abstain from giving help to a Charter-breaking state. Article 103 provides that in the event of a conflict between a treaty and the Charter, the latter shall prevail. On the other hand, the victim of such discrimination could not complain of a breach of neutral duties; for, in acceding to the Charter, it will have agreed in advance to such discrimination. Here the doctrine of qualified neutrality once more comes into its own. Nothing could prevent the Security Council, if it thought fit, from authorizing a state to adopt an attitude of absolute neutrality.

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[1] Goodrich and Hambro, op. cit., p. 179. See also Kirk, 'The Enforcement of Security', in *Yale Law Journal*, 55 (1946), p. 1092.

[2] Art. 52 provides: 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, . . .'

Another question which arises in connexion with Article 48 is this: Will exemption be granted to a state in particular cases, or will it be more general in character? Neither the minutes of the San Francisco Conference nor the commentators on the Charter are clear on this point. It seems probable that the restricted interpretation is closer to the intentions of the authors of the Charter. This interpretation would be similar to that given by the League Assembly in 1921, whereby a state might be exempted from the application of Article 16, paragraph 3. But the formula used in Article 48 is sufficiently wide to admit of a more liberal interpretation.[3]

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[1] The League considered a similar problem in connexion with the possibility of the Council's granting to a state exemption from taking part in sanctions under Art. 16. See Reports and Resolutions on the Subject of Article 16 of the Covenant, A 14, 1927, pp. 83 ff.

[2] This raises a question of interpretation of the Charter. In a discussion concerning a Greek proposal with a view to entrusting the International Court of Justice with the duty of deciding whether a matter fall or not within the domestic jurisdiction of the state concerned, the delegate of the United States gave, as an example, the question of interpreting the provision of Art. 2 (5). He commented that 'there might be a question as to what constituted "every assistance" or whether a State was giving "every assistance". Shall it be the Court or the Council? Some body would have to determine questions such as this. The committees of Commission IV had been studying this very type of problem, but they were not prepared to say that all matters of this kind should be referred to the International Court for settlement.' U.N.C.I.O., I/1/42, Committee I/1, Doc. 1019, vol. vi, p. 509.

[3] In this case this provision might serve as legal justification for a subsequent admission of

(*f*) *Disputes which fall provisionally outside the competence of the Organization.* Articles 53 and 107 of the Charter authorize States Members to take coercive measures against the states which were their enemies in the Second World War.[1] This is a temporary derogation from the provisions of the Charter. Indeed, the measures which may be taken under this Article are in no way subject to the control of the Organization.[2] It is clear, therefore, that other States Members would not be bound by them, and would be able to adopt an attitude of complete neutrality if the measures were such as to lead to open hostilities. This discretionary power of the victors is subject to limitations. There must be a causal relation between the action taken and the Second World War ('as a result of that war'). The wording is vague.[3] Moreover, such measures can only be taken during a limited period of time, although the Charter is silent as to the length of this period. It is not clear whether it extends to the moment when the peace treaties are ratified, or to the moment when the ex-enemy state is admitted as a Member of the United Nations.[4] This provision, which limits the jurisdiction of the Organization and confirms its character as an alliance, has the effect of restoring to the Member States a great deal of their liberty of action and of permitting them to take up an attitude of absolute neutrality, should occasion arise.

4. *The Charter and Non-Member States.* The question whether the Charter is binding on states which are not members of the Organization derives its importance from the fact that a system of collective security is only effective in so far as it brings together the great majority of states, and in particular all the Great Powers. The extent to which the absence of the United States weakened the League of Nations has often been stressed. The withdrawal of Japan, Germany, and Italy aggravated a position which the temporary membership of the Union of Soviet Socialist Republics was not sufficient to restore. From this point of view the

Switzerland to the United Nations, on conditions similar to those provided in 1920 for her entry into the League. See *infra*, pp. 87 ff.

[1] See on this subject Kelsen, loc. cit., pp. 1012 ff.

[2] In contradistinction to the provisions of Art. 107, measures which the five Great Powers may agree to take in accordance with Art. 106 and pending the conclusion of special agreements with Members are measures taken 'on behalf of the Organization'. According to the United Kingdom delegate, 'Enemy States' means 'those which on the day of the signature of the Charter are still at war with any one of the United Nations': U.N.C.I.O., vol. xii, Report of Committee 3 to Commission III, Doc. 1095, III/3/50, p. 560.

[3] See, in regard to the lack of precision of this formula, Kelsen, loc. cit., p. 1013.

[4] Goodrich and Hambro (op. cit., p. 290) are of the opinion that the latter would be the latest at which this freedom of action could be exercised. According to Kelsen (loc. cit.) the ex-enemy states remain in principle permanently outside the law of the Charter, 'for according to the wording of Article 107, it [this outlawry] is not terminated by the admission of an ex-enemy State to the Organisation; and the definition of the term "enemy State" in Article 53, paragraph 2, applies also to States after they have become members of the United Nations' (at p. 1015).

participation of all the Great Powers who were victorious in the Second World War clearly constitutes an advantage of the United Nations in relation to the League system. Yet at the end of 1947 there remained some fifteen states, most of them in Europe, which for a variety of reasons were not members of the Organization.

Article 2, paragraph 6, of the Charter provides: 'The Organisation shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.'[1] It may well be asked how far an international treaty such as the Charter can validly impose legal obligations on third states. The maxim *pacta tertiis nec nocent nec prosunt* is indeed no longer as fully true to-day as it was in the past. In the modern world a treaty of any importance cannot but affect the interests of numerous other states.[2] This is true *a fortiori* of a document like the Charter of the United Nations, which is not so much a simple treaty as the constitutional act of the community of states. There is nevertheless room for doubt whether the Charter can lawfully be invoked against a non-member state.[3] There is no rule of international law to support such a view. Moreover, Article 2, paragraph 6, provides merely that third states ought to act 'in accordance with these Principles'. The reference, it would seem, is to the general principles contained in Chapter I, Articles 1 and 2, of the Charter ('Purposes and Principles') and not to all the specific provisions which follow. The purpose of this provision was, no doubt, to avoid a repetition of the experience of the League of Nations when certain states (such as Japan, Germany, and Italy) simply withdrew in order to recover full freedom of action. Third states would thus be subjected to the duty of abstention. However, the proceedings of the Committee which drafted this Article at San Francisco reveal that several Members wished to go even farther. They suggested not only that Non-Member States should refrain from committing any act in violation of the Charter, such as an act of aggression, but that they should be compelled to participate in measures taken by the Organization against a state which had violated the Charter. This intention appears from the statement made by the Belgian delegate and apparently approved by other delegates: '. . . This is a most important provision, for the Organisation should not be paralysed by having a State invoke provisions such as the Hague agreements, neutrality agreements, etc. He felt that the Organisation could ignore the claim made by non-members because it would be the authorized expression of the international legal community.'[1]

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[1] This Article is taken almost verbatim from the Dumbarton Oaks Proposals (last unnumbered paragraph of Chapter II). The final text was even stronger than the original, for it provided that 'the Organisation shall ensure' instead of 'should'. See the discussion on this point in U.N.C.I.O., Doc. 810, Comm. I/1, vol. vi, p. 347.

[2] As to the effect of treaties on third parties see Oppenheim, *International Law*, vol. i (6th ed. by Lauterpacht, 1947), § 522.

[3] With reference to Art. 103, the problem is examined as follows in the Report of the Rapporteur of Committee IV/2 (Legal Problems) at San Francisco: 'The Committee has considered that in the event of an actual conflict between such obligations (inconsistent obligations in treaties with third States) and the obligations of members under the Charter, particularly in matters affecting peace and security, the latter may have to prevail. The Committee is fully aware that as a matter of international law it is not ordinarily possible to provide in any convention for rules binding upon third parties. On the other hand, it is of the highest importance for the Organisation that the performance of the members' obligations under the Charter in specific cases should not be hindered by obligations which they may have assumed to non-member States': U.N.C.I.O., Doc. 933, IV/2/42 (2), vol. xiii, p. 708.

5. *The Charter and the execution of judgments.* Neither the Covenant of the League nor the Charter of the United Nations has provided any effective machinery for the enforcement of judgments and awards. The Covenant provided in Article 13, paragraph 4, that if a judgment was not carried out, the Council should propose what steps should be taken to give effect thereto. This 'proposal' was in no way binding. Moreover, if the Council's proposal was to have practical effect, there had to be a unanimous vote of the Members, including, perhaps, those of the states concerned, i.e. of the state not carrying out the award. At first sight it would appear that the situation is different under the Charter. Article 94 lays down that 'each Member of the United Nations undertakes to comply with the decision of the International Court of Justice[2] in any case to which it is a party', and that 'if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'. The Security Council thus has a power of decision which was lacking under the Covenant. But what is this decision and what are the measures which the Council can take? Are they the measures involving the use of force provided for in Articles 41 and 42 of the Charter, in which other states might be obliged to participate? This is doubtful. For Article 24 provides that the specific powers granted to the Security Council for the discharge of its duties (maintenance of international peace and security) are laid down in Chapters VI, VII, VIII, and XII. Now Article 94 forms part of Chapter XIV. It may be argued that

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[1] Summary Report of 12th Meeting of Committee I/1, U.N.C.I.O., Doc. 810, vol. vi, p. 348. A study of the minutes reveals that the discussion was restricted to this point. The Australian delegate limited himself to agreeing with his Belgian colleague, merely stating that 'this was a difficult provision to enforce but that it was an essential one'. In spite of the proposal of the Uruguayan delegate to submit the question to the examination of a sub-committee, the Article was immediately and unanimously approved. (Ibid.)

[2] It may be observed that the procedure under the Covenant was of more general application than that under the Charter, for the former covered all international awards of any tribunal, whereas the Charter deals only with judgments of the International Court of Justice (although Art. 95 gives Members full freedom to have recourse to other tribunals).

the powers granted to the Security Council by Article 94 of Chapter XIV have little to do with the maintenance of peace and that the failure to comply with a decision of the Court cannot, within the meaning of the Charter, be assimilated to a threat to peace. Thus the collective measures of compulsion provided for in Chapter VII would not be relevant to the application of Article 94[1]. In consequence, the question of the attitude taken by other states would not arise, for they would not be called upon to participate in collective measures. On the other hand, if Article 94 is given another interpretation, namely, that of the application of Chapter VII,[2] the question would fall within the possible categories of neutrality as examined above.[3]

6. *The Charter and permanent neutrality.* The only state which has succeeded in maintaining its status of permanent neutrality is Switzerland. This neutrality of Switzerland, which derives from a tradition several centuries old, became an institution of the public law of Europe in 1815, when the Congress of Vienna recognized it as being in the interests of Europe and peace. This declaration was confirmed by the Treaty of Versailles in 1919.[4] On 13 February 1920 the Council of the League of

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[1] On this subject see the *Message* of the Swiss Federal Council (8 July 1947) to the Federal Assembly concerning the accession of Switzerland to the Statute of the International Court of Justice (*Feuille fédérale de la Confédération suisse*, 1947, p. 525), where it is said that: 'Comme tout traité, la Charte doit être interprétée de façon restrictive, en ce sens qu'une obligation à la charge des États membres ne peut résulter que d'une disposition expresse. C'est ainsi qu'au Chapitre VII relatif aux mesures de coercition en cas de menace contre la paix, de rupture de la paix et d'acte d'agression, la Charte indique de façon précise les cas dans lesquels les États membres, même étrangers au conflit, peuvent être appelés à participer à une action décidée par le Conseil de Sécurité. Or, aux deux alinéas de l'article 94, il n'est question que des États parties à un litige.' This construction seems reasonable; if it be adopted, the 'measures' referred to in Art. 94, paras. 1 and 2, would be of a different nature. In that case this Article would grant the Security Council additional power permitting it to take appropriate action to ensure observance of the Court's judgment in the absence of any menace to peace or breach of the peace. See on this subject Goodrich and Hambro, op. cit., pp. 264–5. The minutes of the discussions in Committee IV/1 of the San Francisco Conference do not show clearly what was the intention of the authors of this provision. 'Their principal concern seems to have been to make sure that the aggrieved party had recourse to the Security Council.' (Ibid.)

Hudson also is of opinion that there is no incompatibility between the obligations under Art. 94 and permanent neutrality. He points out that the Committee of Experts of the United Nations placed on the same footing non-members which are parties to the Statute and non-parties which are, in a particular case, given access to the Court. Both have the same complementary obligations under Arts. 25 and 103 'in relation to the provisions of Article 94 (but not otherwise)'. These last words from the Report of the Committee of Experts must be interpreted to mean, says Hudson, 'that neither the State having mere access nor the non-Member party to the Statute is bound by the "complementary obligations" under Articles 25 and 103 with regard to decisions of the Security Council designed to give effect to judgments rendered by the Court in cases to which they were not parties before the Court' ('Switzerland and the International Court of Justice', in *American Journal of International Law*, 41 (1947), p. 871).

[2] This interpretation is not wholly excluded owing to the vagueness of Art. 94.

[3] See *supra*, pp. 79 ff.

[4] Art. 435. Among the numerous works on the permanent neutrality of Switzerland there is a useful account of its history in Bonjour, *La Neutralité Suisse* (1944). The legal aspect has recently been dealt with by Guggenheim, 'Das Sicherheitssystem der Vereinigten Nationen und

Nations stated, in the Declaration of London, that the neutrality of Switzerland was compatible with her position as a member of the League. Such compatibility was based on a distinction between military and economic sanctions, and was made possible by the participation of Switzerland in the latter only. This distinction was never put to the test by events. It was rendered possible largely by the balance of power in Europe. This explains why, when this balance appeared to be threatened in 1938, Switzerland returned, with the approval of the League of Nations, to so-called integral neutrality.[1]

The system of collective security established by the United Nations does not, at first sight, appear to leave any room for the status of permanent neutrality. The inconsistency between the two appears obvious. This was the view of several delegates at the San Francisco Conference during the discussion on Article 2, paragraph 5, of the Charter and on the amendment proposed by the French delegate.[2] However, as shown above, the Charter allows of account being taken of the special position of states. Article 48, in Chapter VII, in particular, would furnish grounds for the granting of a special status to Switzerland. The expediency of such a decision is a political matter which falls outside the scope of this article. The predominance of the extra-European element in the framing of the Charter was not conducive to an understanding of the unique geographical and historical position of Switzerland. Swiss neutrality has never been synonymous with lack of international solidarity or with selfishness and indifference. That country has traditionally considered neutrality as necessary for its very existence as a composite community of several races, where four different languages are spoken and different faiths professed.[3]

It is conceded that the grant of a privileged status to one Member would expose the Organization to the risk of similar demands by others.[4] But it is pointed out that it would be erroneous to compare the position of other countries, whose neutrality has been occasional and temporary, with that of Switzerland, which is of a permanent nature and has been recognized as corresponding to the interests of the other European Powers.[5] Switzerland has shown its desire for co-operation by becoming a member of

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die schweizerische Neutralität', in *Neue Schweizer Rundschau*, 1945, pp. 391 ff. See also Huber in Munch, op. cit., vol. ii (1924), pp. 68 ff.; Gorgé, *La Neutralité helvétique* (1947).

[1] Resolution of 14 May 1948: *Official Journal*, 1938, p. 370.

[2] See *supra*, pp. 77 ff.

[3] With reference to neutrality as a basic principle of the International Red Cross see the article by Huber in *Annuaire suisse de droit international*, 1 (1944), pp. 48 ff.

[4] It is, however, clear from the history of the League of Nations that neither the status of Switzerland nor the return of other small states to a policy of neutrality in 1937–8 in any way tended to weaken the machinery of security. These events were a consequence, and not a cause, of the weakening of the organization for which other Powers were responsible.

[5] On the subject of Swiss neutrality and international organization see especially Rappard, 'Dumbarton Oaks et Nous', in *La Suisse, Annuaire national*, 1945, pp. 7 ff.; the same, 'La Suisse

several specialized agencies created within the framework of the United Nations, notably the Food and Agriculture Organization, the United Nations Educational, Scientific, and Cultural Organization, the International Civil Air Organization, and the World Health Organization. It has always been a member of the International Labour Organization. Furthermore, Switzerland has recently become a party to the Statute of the International Court of Justice.

et la Charte de San Francisco', ibid., 1946, pp. 7 ff.; Guggenheim, *Völkerbund, Dumbarton Oaks und die schweizerische Neutralität* (1945); the same in *Annuaire suisse de droit international*, 2 (1945), pp. 9 ff.; the same in *Neue Schweizer Rundschau*, 1945, pp. 391 ff.

ADMISSION TO THE UNITED NATIONS

By P. O. HUMBER

I. *The practice*

THE membership of the United Nations was largely decided already before the San Francisco Conference. The invitation was sent on 5 March 1945[1] to the states which had signed the United Nations Declarations, with the exception of Poland.[2] Apart from these forty-six states, five more were admitted as original Members.[3] Thus the Byelorussian and the Ukrainian Soviet Socialist Republics were unanimously admitted as original Members of the Organization[4] on the recommendation of the Steering Committee.[5] They participated in the Conference.[6] The position of Argentina was more complicated. However, after a debate and vote, that country was also admitted as an original Member and participant in the Conference.[7] The question of the participation of Poland was discussed at some length, with the result that, though a resolution of sympathy was voted,[8] Poland was not invited to the Conference. Subsequently, she signed the Charter as an original Member.[9] The Conference also adopted a Resolution[10] which was primarily directed against membership of Franco Spain, but which was couched in general terms. This Resolution carries political weight, but is not binding on the Security Council nor on the General Assembly.

The Potsdam Conference between President Truman, Generalissimo Stalin, and Mr. Attlee and their advisers discussed membership in the United Nations and issued a declaration on 2 August 1945.[11] The three statesmen made it clear that they desired, in principle, to support applications for membership by former neutrals.[1] They also reiterated that they did not welcome Spain of the Franco régime.[2] The declaration, in so far as it concerns the ex-enemy states in Europe, is of sufficient importance to merit quotation in full:

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[1] See Goodrich and Hambro, *Charter of the United Nations* (1946), p. 320.

[2] Ibid., p. 78.

[3] See *United Nations Conference on International Organization.* Documents published by the United Nations Information Organization in collaboration with the Library of Congress: 19 volumes, plus index; subsequently to be quoted as *U.N.C.I.O.*

[4] See *U.N.C.I.O.*, vol. i, p. 168.

[5] Ibid., vol. v, pp. 118 and 155.

[6] Ibid., vol. i, p. 344.

[7] Ibid., vol. v, pp. 118 and 155, and vol. i, pp. 344 ff., especially p. 359.

[8] 'The Governments of the United Nations express to the people of Poland their sympathy and their admiration. They hope that the constitution of a Polish Government, recognized as such by the sponsoring nations, will make it possible for Polish delegates to come and take part as soon as possible in the work of the Conference' (ibid., vol. v, p. 188). This Resolution was unanimously passed by the plenary meeting (ibid., vol. i, p. 168).

[9] See *Department of State Bulletin*, vol. xiii, p. 627.

[10] 'It is the understanding of the Delegation of Mexico that paragraph 2 of Chapter III cannot be applied to the States whose regimes have been established with the help of military forces belonging to the countries which have waged war against the United Nations, as long as those regimes are in power' (*U.N.C.I.O.*, vol. i, pp. 615–16).

[11] Published in Goodrich and Hambro, op. cit., pp. 381 ff., and Harley, *Documentary Textbook on the United Nations* (1947), pp. 768 ff.

> 'The three governments consider it desirable that the present anomalous position of Italy, Bulgaria, Finland, Hungary and Rumania should be terminated by the conclusion of peace treaties. They trust that the other interested Allied governments will share these views.
>
> 'For their part, the three governments have included the preparation of a peace treaty for Italy as the first among the immediate important tasks to be undertaken by the new Council of Foreign Ministers. Italy was the first of the Axis powers to break with Germany, to whose defeat she has made a material contribution, and has now joined with the Allies in the struggle against Japan. Italy has freed herself from the Fascist regime and is making good progress toward the re-establishment of a democratic government and institutions. The conclusion of such a peace treaty with a recognized and democratic Italian government will make it possible for the three governments to fulfil their desire to support an application from Italy for membership of the United Nations.
>
> 'The three governments have also charged the Council of Foreign Ministers with the task of preparing peace treaties for Bulgaria, Finland, Hungary and Rumania. The conclusion of peace treaties with recognized democratic governments in these States will also enable the three governments to support applications from them for membership of the United Nations. The three governments agree to examine, each separately in the near future, in the light of the conditions then prevailing, the establishment of diplomatic relations with Finland, Rumania, Bulgaria and Hungary to the extent possible prior to the conclusion of peace treaties with those countries.
>
> 'The three governments have no doubt that in view of the changed conditions resulting from the termination of the war in Europe, representatives of the Allied press will enjoy full freedom to report to the world upon developments in Rumania, Bulgaria, Hungary and Finland.'

The legal character of a declaration of this nature is obscure. It is without any binding effect on the Organization or its Members. Further, the three permanent Members of the Security Council are free, as among themselves, to act according to this Declaration or to agree to a change in their policy. The only doubtful question is whether the three states are legally bound to act according to the Declaration until they agree to change it. It is extremely doubtful whether any members of the Security Council are entitled to enter into binding contractual commitments as to how to vote in the Council. A refusal to act according to the Potsdam Declaration would not affect the validity of a decision of the Security Council. As far as the Council is concerned, the Declaration is *res inter alios acta.* Yet a disregard of the Declaration by one of the signatories would indicate a breach of faith which might entail grave political consequences. Any possible conflict in this respect must be solved on the basis of Article 103 of the Charter.[1] .

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[1] 'The three governments, so far as they are concerned, will support applications for membership from those states which have remained neutral during the war and which fulfil the qualifications set out above.'

[2] 'The three governments feel bound however to make it clear that they for their part would not favour any application for membership put forward by the present Spanish Government, which, having been founded with the support of the Axis powers, does not, in view of its origins, its nature, its record and its close association with the aggressor states, possess the qualifications necessary to justify such membership.'

The first discussion in the Security Council on the subject of applications for membership of the United Nations[2] was at its 41st and 42nd meetings in connexion with the question of the rules of procedure for the admission of new Members.[3] The Australian delegation objected to the procedure proposed by the Committee of Experts on the ground that applications should come first before the Security Council. Membership involved participation in all spheres of the work of the Organization, and not only in matters affecting security. For that reason, in the Australian view, the General Assembly ought to be the organ mainly responsible for the admission of Members.[4] However, the Security Council adopted rules of procedure according to which it is in the first place for the Council to examine every application before its transmission (if the applicant state is recommended for membership) to the General Assembly.[5]

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[1] 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[2] See Security Council, *Official Records*, First Year, Second Series, Suppl. 4, pp. 17 ff.

[3] See *Journal of the Security Council*, 1946, pp. 653 ff.

[4] The Australian delegate eventually made a formal proposal to this effect in the General Assembly: 'The General Assembly, recognizing that the admission of new Members to the United Nations is a corporate act of the whole Organization, requests the Security Council to appoint a committee to confer with the Committee on Procedures of the General Assembly with a view to preparing rules governing the admission of new Members which will be acceptable both to the General Assembly and to the Security Council.

'In the preparation of such rules regard should be paid to the following principles:

'(*a*) The admission of new Members is a corporate act.

'(*b*) The General Assembly has primary and final responsibility in the process of admission.

'(*c*) The Security Council, not having been given any general power covering all matters within the scope of the Charter, its recommendation for the admission of an applicant to membership should be based solely on the judgment of the Council that the applicant State is able and willing to carry out its obligations under those sections of the Charter which come within the competence of the Security Council' (U.N. General Assembly Doc. A/C.1/23, A/C.1/23, Rev. 1, and A/C.1/23, Corr. 1).

[5] 'Chapter X. Admission of New Members.

'*Rule 58.* Any State which desires to become a Member of the United Nations shall submit an application to the Secretary-General. This application shall be accompanied by a declaration of its readiness to accept the obligations contained in the Charter.

'*Rule 59.* The Secretary-General shall immediately place the application for membership before the representatives on the Security Council. Unless the Security Council decides otherwise, the application shall be referred by the President to a committee of the Security Council upon which each member of the Security Council shall be represented. The Committee shall examine any applications referred to it and report its conclusions thereon to the Council not less than thirty-five days in advance of a regular session of the General Assembly or if a special session of the General Assembly is called, not less than fourteen days in advance of such session.

'*Rule 60.* The Security Council shall decide whether in its judgment the applicant is a peace-

The Security Council agreed that applications should first be submitted to a Committee of the Council upon which all members of the Security Council should be represented.[1] This Committee agreed to apply for additional information from the applicants themselves and from other states. The following two Resolutions[2] were adopted by the Security Council without any formal vote being taken:[3]

> '1. Resolution of the Australian delegation:
>
> 'The Committee will consider written statements of facts from any of the applicant States or from any Member of the United Nations bearing on the applications which the Committee has been instructed to examine.'

The voting on this Resolution in the Committee was as follows: seven votes for, one vote against, and three abstentions.

> '2. Resolution of the Chinese delegation:
>
> 'The Committee considers that it has the right to ask information from Governments of Member States or applicants having bearing upon the applications before the Council.'

The voting on this Resolution in the Committee was as follows: eight votes for, two votes against, and one abstention.

When the first applications came before the Security Council there was reluctance among many of its members to reject states which had applied for membership. Both the American delegate[4] and the delegate for Mexico[5] proposed that all the applicants should be admitted *en bloc*. Owing, however, to the Soviet opposition to this procedure, both these proposals were withdrawn.[6] Later, the Egyptian delegate proposed that the applications should be discussed in the English alphabetical order of the names of the states concerned.[7] He subsequently withdrew his proposal in order that the applications might be discussed in the order in which they had been received by the Secretary-General.[8]

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loving State and is able and willing to carry out the obligations contained in the Charter, and accordingly whether to recommend the applicant State for membership.

'In Order to assure the consideration of its recommendation at the next session of the General Assembly following the receipt of the application, the Security Council shall make its recommendations not less than twenty-five days in advance of a regular session of the General Assembly, nor less than four days in advance of a special session.

'In special circumstances, the Security Council may decide to make a recommendation to the General Assembly concerning an application for membership subsequent to the expiration of the time limits set forth in the preceding paragraph.'

[1] See Security Council, *Official Records*, First Year, Second Series, Suppl. 4, pp. 53–4.

[2] See ibid., First Year, Second Series, pp. 18–19.

[3] Ibid., p. 29. It should also be mentioned that the Committee sent questionnaires to certain of the states in question.

[4] Ibid., pp. 42–3.

[5] Ibid., p. 116.

[6] Ibid., pp. 53 and 124.

[7] Ibid., p. 61.

[8] See ibid., p. 62.

The individual applications.

Albania.[1] The preliminary Albanian application for membership, which stressed the war effort of that country and her willingness to fulfil the obligations of membership, was sent on 20 December 1945.[2] The final application was received on 25 January 1946.[3] The debate was postponed until other applications for membership should be received.[4] A questionnaire was sent to Albania asking for precise information on the following points:[5]

'1. Does Albania consider itself in a state of war with Greece?

'2. If so, how, in the view of Albania, is this state of war to be ended?

'3. Is the Albanian Government prepared to accept the peaceful means of settlement provided by the Charter in connection with territorial claims or other disputes with another State?

'4. Has the Albanian Government terminated the treaties existing between Albania and other States prior to 7 April 1939?

'5. What is the attitude of Albania towards the continued validity of treaties and agreements in effect on that date between Albania and other States now Members of the United Nations?

'6. Can the Albanian Government give information on the following matters which have been brought to the attention of the Committee:

(*a*) the report of twenty-one incidents on the Greek–Albanian frontier since early 1946, listed in the annex to document S/123;

(*b*) the report that on 15 May 1946 two British warships were fired on by batteries on the Albanian coast;

(*c*) the report of the seizing of Greek citizens and their detention in Albanian concentration camps, denial of access to these camps of representatives of the International Red Cross and alleged ill-treatment of the inmates, listed in document S/123.

What representations have been made by other Governments in respect of the above-mentioned matters and what action has the Albanian Government taken in regard to these representations?

'7. In addition, it would assist the Committee in making its report to the Security Council if it could be supplied with official information regarding the results of the general election of 2 December 1945, including the total number of electors enrolled; the number of electors who cast votes; the distribution of votes.

'The asking of these questions is not in any way an expression of opinion by the Committee on the Albanian application.'[6]

France and the United States proposed postponing the vote on the Albanian application for membership.[7] These proposals were not accepted,[1] and the final vote resulted in the rejection of the Albanian application.[2] The Albanian application was again discussed in 1947. The Sub-Committee examined the Albanian attitude towards the recommendation of the Security Council to refer to the International Court of Justice[3] the Corfu Channel case and also the situation on the border between Albania and Greece.[4] The report of the Committee on Membership gave a very full summary of the discussion in the Sub-Committee.[5] The application of Albania was rejected again, for substantially the same reasons as in 1946.[6]

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[1] Albania is a member of the International Labour Organization, the Universal Postal Union, and the International Telecommunications Union.

[2] See Security Council, *Official Records*, First Year, Second Series, Suppl. 4, p. 18.

[3] Ibid., p. 54.

[4] See *Journal of the Security Council*, First Year, p. 262.

[5] Security Council, *Official Records*, First Year, Second Series, Suppl. 4, p. 91.

[6] The answer from the Albanian Government, which is not reproduced in this article, is printed in ibid., pp. 62 ff.

[7] Security Council, *Official Records*, First Year, Second Series, Suppl. 4, pp. 55, 57, 66.

Mongolian People's Republic. The application of this country was received by telegram on 24 June 1946.[7] The following questionnaire was sent:[8]

> '1. What is the present extent of Mongolia's foreign relations including political, economic, social and cultural?
>
> '2. What is the attitude of the Mongolian Government regarding the development of her foreign relations and in particular the exchange of diplomatic or consular representatives?
>
> '3. What countries other than the Soviet Union and China have hitherto proposed to enter into diplomatic or consular exchanges with the Mongolian People's Republic, and what replies have been given?
>
> '4. It would also assist the Committee if it could be given more detailed information regarding:
>
> (*a*) The Constitution of the Mongolian People's Republic and other pertinent facts relating to its system of government and the conduct of its foreign relations.
>
> (*b*) The budget, particularly the appropriation in respect to international affairs.'[9]

The United States and France proposed that consideration of the application should be postponed. These proposals were not accepted,[10] and the final vote resulted in rejection of the application.[11] The Mongolian application was again discussed in 1947 by the Membership Committee[12] and by the full Council.[13] The application, which received only three favourable votes,[14] was rejected.

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[1] Security Council, *Official Records*, First Year, Second Series, Suppl. 5, p. 5, 135.

[2] Brazil, France, Mexico, Poland, and the Soviet Union voted in favour; the Netherlands, United Kingdom, United States of America against; Australia, China, and Egypt abstained (ibid., p. 136).

[3] See U.N. Doc. S.C./P.V. 127, p. 46; *First Year Book of the International Court of Justice*, p. 121; and S/C.2/S.R. 16.

[4] Ibid., 16, 17, and 18.

[5] S/479 and S/479, corr. 1, pp. 3–8.

[6] S/P.V. 186, p. 66.

[7] Security Council, *Official Records*, First Year, First Series, p. 864, and S/95. See also Security Council, *Official Records*, First Year, Second Series, Suppl. 4, pp. 48 and 54.

[8] Ibid., p. 123.

[9] No answer was received in time for consideration here. See ibid., pp. 66–7.

[10] Security Council, *Official Records*, First Year, First Series, p. 135.

[11] In favour: Brazil, China, France, Mexico, Poland, Soviet Union; against: the Netherlands, United Kingdom, United States of America; abstentions: Egypt and Australia: ibid., Second Series, No. 5, p. 138.

[12] S/479, pp. 8–13.

[13] S/P.V. 186, pp. 66–76.

[14] Ibid., p. 77.

Afghanistan. This country applied by telegram on 2 July 1946.[1] The application did not give rise to any objection or difficulty. The country was considered to be peace-loving[2] and the application was unanimously approved.[3] Afghanistan was then unanimously admitted by the General Assembly.[4]

Transjordan[5] applied on 26 June 1946.[6] The application was received on 8 July.[7] The following questionnaire was sent to Transjordan:[8]

> 'The Committee on the Admission of New Members would be appreciative if you would be kind enough to supply additional information on the following points to assist the Committee in preparing its report:
>
> '1. The means of maintaining the territorial integrity and political independence of the Hashemite Kingdom of Transjordan.
>
> '2. The budget of the Hashemite Kingdom of Transjordan with as much detail as possible concerning sources of revenue and headings of expenditure.
>
> '3. The effect of the application of the annex of the Treaty of Alliance between the United Kingdom and the Hashemite Kingdom of Transjordan of March 22 1946 on the maintenance of Transjordan's territorial integrity and political independence.'[9]

The application was rejected owing to the adverse vote of Soviet Russia.[10] It was taken up again in the Membership Committee[11] and the Council.[12] The Soviet delegate stressed that he had serious doubts concerning the independence of Transjordan.[13] The result of the voting was: nine in favour, one against, and one abstention. As the one Member opposing was the Soviet Union, the application was rejected.[14]

Eire.[15] The application of Eire was sent by telegram on 2 August 1946.[16] At the conclusion of the discussion the Soviet Government made use of its veto to bring about the rejection of the application.[17] The discussion of Eire's admission in 1947 did not bring any new arguments either in the Membership Committee[18] or in the Council,[19] and the voting showed the same result as in the previous year.[20]

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[1] See S/98 and Security Council, *Official Records*, First Year, Second Series, Suppl. 4, pp. 49 and 55.

[2] Ibid., First Series, p. 49.

[3] Ibid., p. 138.

[4] See Assembly Doc. 1946, A/64, add. 1, p. 61.

[5] Transjordan is a member of the International Civil Aviation Organization and the U.P.U.

[6] See Assembly Doc. A/108, and also Security Council, *Official Records*, First Year, Second Series, Suppl. 4, p. 50.

[7] Ibid., p. 55.

[8] Ibid., p. 143.

[9] The answer from the Transjordan Government is printed in ibid., pp. 143–5.

[10] See ibid., First Year, Second Series, p. 139.

[11] S/479, pp. 13–14.

[12] S/P.V. 189, pp. 80–3.

[13] S/479, p. 14.

[14] S/P.V. 189, p. 85.

[15] Eire is a member of the I.L.O., F.A.O., I.C.A.O., U.P.U., and I.T.U.

[16] See Security Council, *Official Records*, First Year, Second Series, Suppl. 4, pp. 50 and 55.

[17] Ibid., First Year, Second Series, p. 139.

[18] S/479, pp. 14–15.

[19] S/P.V. 189, pp. 86–7.

[20] Ibid., p. 87.

Portugal.[1] The application was sent by telegram from the Portuguese Ambassador in Washington on 2 August 1946, and was received the same day.[2] It was rejected as the result of the adverse vote of the Soviet Union.[3] The discussion in the Committee[4] and the Security Council[5] in 1947 did not throw new light on this application, and the voting showed the same result as in 1946.[6]

Iceland. The application for membership was sent in a letter from the Icelandic Minister in Washington on 2 August 1946, and was received the same day.[7] It was unanimously approved.[8] Iceland was then unanimously admitted by the General Assembly.[9]

Siam. Siam applied for admission to membership on 20 May 1946.[10] The formal application was received on 5 August 1946.[11] Her application was then withdrawn on account of an unsettled dispute with France.[12] Later, however, the dispute having been settled, the application was resubmitted, and the Security Council unanimously recommended the admission of Siam to membership.[13] The General Assembly unanimously confirmed that decision.[14]

Sweden. That country applied, accepting in advance all obligations involved, by telegram from the Foreign Minister on 9 August 1946.[15] The application was unanimously approved by the Security Council[16] and by the General Assembly.[17]

Hungary[18] applied for membership on 22 April 1947.[19] The representatives of Brazil[20] and the United States[20] expressed doubts as to the ability of the Hungarian Government to carry out the obligations of the Charter, and the United Kingdom representative felt that it did not abide by the guarantees for human rights as set forth in the peace treaties.[21] At the meeting of the Security Council on 21 August 1947 Hungary obtained only one vote.[22]

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[1] Portugal is a member of the I.L.O., F.A.O., I.C.A.O., U.P.U., and I.T.U.

[2] See Security Council, *Official Records*, First Year, Second Series, Suppl. 4, pp. 51 and 55.

[3] See ibid., First Year, First Series, p. 139.

[4] S/479, pp. 15–17.

[5] S/P.V. 189, pp. 87–101.

[6] Ibid., p. 102.

[7] See Security Council, *Official Records*, First Year, Second Series, Suppl. 4, pp. 51 and 55.

[8] See ibid., First Year, First Series, p. 140.

[9] See Assembly Doc. 1946, A.64, Add. 1, p. 61.

[10] Doc. 1946, S/73.

[11] Security Council, *Official Records*, First Year, Second Series, Suppl. 4, p. 55.

[12] Ibid., First Year, Second Series, p. 41, and Suppl. 4, pp. 44 and 47.

[13] See 81st, 82nd, and 83rd meetings of the Security Council.

[14] See Assembly Doc. 1946, A/64, Add. 1, p. 198.

[15] See Security Council, *Official Records*, First Year, Second Series, Suppl. 4, pp. 52 and 55.

[16] See ibid., First Year, First Series, p. 140.

[17] See Assembly Doc. A/64, Add. 1, p. 61.

[18] Hungary is a member of the I.L.O., F.A.O., U.P.U., and I.T.U.

[19] S/479, p. 17.

[20] Ibid., p. 20.

[21] Ibid., p. 21.

[22] S/P.V. 190, p. 31.

Italy[1] applied for membership on 7 May 1947.[2] The Italian application was supported by all the Members, except the U.S.S.R., on the Membership Committee.[3] This was also the result of the voting in the Security Council,[4] where the U.S.S.R. refused to treat Italy differently from any of the other belligerent states[5] although it was pointed out by other delegates that Italy had been a co-belligerent.[6] In September 1947 the U.S.S.R. again vetoed the admission of Italy on the ground that the other ex-enemy countries were not admitted at the same time[7]—a reasoning which was characterized as 'horse-trading' by the delegate from the United Kingdom.[8]

Austria[9] applied for membership on 2 July 1947.[10] The discussion concerning Austria both in the Committee[11] and in the Security Council[12] showed striking similarities to the situation concerning Italy. The result of the voting was also the same.[13]

Roumania[14] applied for membership on 10 July 1947.[15] Several of the delegates on the Committee expressed doubts concerning the respect for civil liberties in the country and the ability of that country to fulfil the obligations of the Charter.[16] In the Security Council on 21 August the application of Roumania was supported by one state only.[17] The vote taken on 1 October was more favourable, but the application was rejected.[18]

Yemen applied for membership on 21 July 1947.[19] The application was unanimously recommended by the Membership Committee[20] and by the Security Council,[21] and approved by the General Assembly.[22]

Bulgaria[23] applied for membership on 26 July 1947.[24] The fate of this proposal in the Membership Committee[25] and the Security Council[26] was the same as in the case of Roumania;[27] the Bulgarian application was also defeated on 1 October 1947.[28]

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[1] Italy is a member of the I.L.O., F.A.O., the International Bank for Reconstruction and Development, the International Monetary Fund, U.P.U., and I.T.U.

[2] S/355 and S/479, p. 17.

[3] S/479, pp. 21 and 22.

[4] S/P.V. 190, pp. 31 ff.

[5] Ibid., pp. 56 ff.

[6] Ibid., p. 71.

[7] S/P.V. 209, p. 46.

[8] S/P.V. 204, p. 62.

[9] Austria is a member of F.A.O., the United Nations Educational, Scientific and Cultural Organization, U.P.U., and I.T.U.

[10] S/479, p. 17.

[11] Ibid., p. 23.

[12] S/P.V. 190, pp. 73 ff.

[13] Ibid., p. 82: 8 in favour, 1 against, 2 abstentions.

[14] Roumania is a member of the U.P.U. and I.T.U.

[15] S/479, p. 17.

[16] Ibid., p. 24.

[17] S/P.V. 190, p. 86.

[18] S/P.V. 206, p. 136. China, Colombia, France, and Syria voted in favour, with Australia, Belgium, Brazil, Poland, the U.S.S.R., United Kingdom, and United States abstaining: A/406, p. 6.

[19] S/479, p. 17.

[20] Ibid., p. 25.

[21] S/P.V. 186, p. 136, and A/350.

[22] 30 September 1947: see *Journal* No. 14, p. 4.

[23] Bulgaria is a member of the I.L.O.

[24] S/479, p. 17.

[25] Ibid., p. 25.

[26] S/P.V. 190, pp. 86 ff.

[27] Ibid., p. 88.

[28] S/P.V. 206, p. 136. Belgium, France, and the United Kingdom signed against, Syria in favour, and there were 7 abstentions: A/406, p. 6.

Finland[1] applied for membership on 19 September 1947.[2] The position proved to be the same as in the case of Austria and Italy, and the application was defeated by the same vote.[3]

Pakistan applied for membership on 15 August 1947. This was not referred to the Committee on Membership, but decided directly by the Security Council which recommended admission by a unanimous vote.[4] Certain doubts were expressed in the First Committee concerning the legal questions involved in cases where a Member State is split in two.[5]

II. *Conditions of admission*

Basis of decision. We may now review the interpretation given by the Security Council to Article 4. It seemed obvious from the outset that the terms of Article 4 of the Charter did not constitute an adequate and exhaustive definition of qualifications of membership. It may, indeed, be difficult to define with exactitude the meaning of the expression 'peace-loving' state. It has been suggested that it means 'any State which declared war on the Axis Powers'.[1] Certain delegates of the Members of the Security Council were of the opinion that it would be outside the competence of the Security Council to impose criteria other than those specifically mentioned in the Charter.[2] This, however, was not the opinion of the majority of the delegates in the Security Council.

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[1] Finland is a member of the I.L.O., F.A.O., the International Monetary Fund, the International Bank, U.P.U., and I.T.U.

[2] S/599.

[3] S/P.V. 206, p. 140, and A/406, p. 7.

[4] S/P.V. 186, p. 146, and A/350.

[5] The following observations of the Rapporteur of the Legal Committee on the subject may be usefully quoted:

'1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of an organization of the United Nations does not cease to be a Member simply because its constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

'2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or no they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.' (A/C/6/162, p. 2.)

The following passage from the Memorandum of the Secretariat on the subject is of interest:

'1. From the viewpoint of international law, the situation is one in which a part of an existing state breaks off and becomes a new state. On this analysis, there is no change in the international status of India; it continues as a state with all treaty rights and obligations, and consequently with all the rights and obligations of membership in the United Nations. The territory which breaks off, Pakistan, will be a new state; it will not have the treaty rights and obligations of the old state, and it will not, of course, have membership in the United Nations.

'In international law, the situation is analogous to the separation of the Irish Free State from Great Britain and of Belgium from the Netherlands. In these cases, the portion which separated was considered a new state; the remaining portion continued as an existing state with all of the rights and duties which it had before.

'2. Apart from the question of separation, the Independence Act has effected a basic constitutional change in India. The existing State of India has become a Dominion, and consequently, has a new status in the British Commonwealth of Nations, independence in external affairs, and a new form of government. It is clear, however, that this basic constitutional change does not affect the international personality of India, or its status in the United Nations.

'The only question it raises is whether new credentials should be requested for the Indian representative in the organs of the United Nations. Although there is no precedent for this situation in the United Nations, there is some basis in diplomatic practice for requesting new credentials in cases of States which have undergone a change of sovereignty, as from a monarchy to a republic. It would, therefore, seem appropriate for the Secretary-General to suggest to the Government of India that in view of the change in sovereignty, it would be desirable to have new credentials issued to the Indian representatives by the Head of the Government or the Foreign Minister of the new Dominion of India.' 12 August 1947.

Universality. The United States delegate proposed that all the states which had applied for membership should be admitted *en bloc*.[3] This recommendation was supported by the Secretary-General[4] and by the representatives of Brazil,[5] Mexico,[6] Egypt,[7] China,[8] the Netherlands,[9] and France.[10] The delegates of the U.S.S.R.[11] and Australia[12] expressed themselves strongly against this procedure. They contended that it was the definite duty of the Security Council to examine each individual case and to make a recommendation to the General Assembly. They felt that the Council would be avoiding its responsibility by adopting the procedure proposed by the United States delegate. They pointed out that the report of the Committee on the admission of new members contained a number of objections, some of them substantial, to several of the applicants for membership. To cut the Gordian knot by accepting all of them *en bloc*, without further examination of these objections, simply in order to avoid the controversy and possible exercise of the veto which would ensue from the consideration of each case separately, would mean an undue simplification of the problem. They suggested that the proposal be withdrawn;[13] the American delegate acceded to the suggestion.[14] Most of the states which expressed themselves in favour of the American proposal did so mainly because of the importance which they attached to the universality of the Organization. For that reason, the American proposal was taken up again by the delegate of Mexico,[1] but was once more withdrawn in similar circumstances.[2] Several speakers in the General Assembly[3] also expressed themselves in favour of universality.

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[1] See Goodrich and Hambro, op. cit., p. 80.

[2] See, for instance, Señor Nervo (Mexico) in Security Council, *Official Records*, First Year, Second Series, p. 97, and Mr. Hasluck (Australia), ibid., p. 99.

[3] See ibid., p. 41.

[4] Ibid., pp. 43–4.

[5] Ibid., p. 44.

[6] Ibid., p. 45.

[7] Ibid., p. 46.

[8] Ibid., p. 51.

[9] Ibid., p. 52.

[10] Ibid., p. 56.

[11] Mr. Gromyko (U.S.S.R.) said: '. . . I cannot agree that we should adopt resolutions for the wholesale admission to the Organization of all countries who have applied for membership. Countries cannot be regarded as things and dealt with in accordance with a standard measure. When we discuss the question of admission to the Organization, we are bound to discuss each concrete application separately, taking into consideration all the facts and circumstances relating to the application in question. For this reason I am unable to agree with the proposal of the United States representative that the Security Council should adopt a resolution for the wholesale admission of all eight countries to the Organization' (ibid., p. 47).

[12] Mr. Hasluck's forceful statement is well worth reading; see ibid., pp. 47–50.

[13] See ibid., p. 52.

[14] Ibid., p. 53.

It is stated in Article 4 that the Organization is 'open to' other peace-loving states. This does not mean that all peace-loving states have a right to become Members. The condition, it appears, is a negative one. No state that is not peace-loving can be admitted. Once it is conceded that a state is peace-loving, it may or it may not be admitted. It might be asked whether, in the absence of a definite provision of the Charter to that effect, a state is bound to give a definite answer to such a question. The answer will probably be clearer after the International Court of Justice has acted upon the request to give an Advisory Opinion on the interpretation of Article 4.

Any community which may be considered to have reached a sufficiently advanced stage of development to be a Member can be admitted, whether it is called a State or not. The fact of admission may be held to imply recognition of the statehood of the community in question.[4] The whole question of recognition of states is, of course, a very difficult one.[5] It is not possible in this article to enter into a discussion of the intricate questions involved in this subject. It might be sufficient to say that recognition of states should not be confused with recognition of governments, and it might be added that it would be difficult to vote for the admission of any politically organized territory as a Member of the United Nations without thereby granting to such territory either explicit or implicit recognition as a state. The mere fact that the boundaries of a state are disputed does not in itself deprive a state of its status as such and prevent it from being admitted to membership. This emerges from the debate on Albania and from the terms of the questionnaire presented to the Albanian delegation. Obviously, the methods adopted by a state in settling a territorial dispute may be indicative of its 'peace-loving' spirit or otherwise.

With regard to diplomatic representation, although the Charter does not refer to the necessity of diplomatic representation between the Members of the Organization, the point was raised in this connexion by the states concerned.[1] The Chinese delegate's remarks in the matter of the foreign relations of the Mongolian People's Republic are of interest as showing that the absence of diplomatic relations may be an indication of a lack of experience in international affairs.[2]

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[1] See Security Council, *Official Records*, First Year, Second Series, p. 114.

[2] Ibid., p. 124.

[3] See, for example, the delegate for Sweden in A/C.1/S.R. 98, p. 1, and Brazil, ibid., p. 6.

[4] See Kelsen, *General Theory of Law and State* (1945), pp. 181 ff., and his article on 'Membership' in *Columbia Law Review*, 46 (1946), pp. 391 ff. See also the remarks by the United States delegate in Security Council, *Official Records*, First Year, Second Series, p. 42; and Goodrich and Hambro, op. cit., p. 79. If this interpretation is correct, it should not be necessary to discuss whether a 'dominion', a 'colony', a 'protectorate', or any territory thus or similarly labelled may become a Member. The name is merely a convenient label which may—or may not—help to identify the true character of the territory in question.

[5] See Lauterpacht, *Recognition in International Law* (1947), and Jimenez de Arechaga, *Reconocimiento de Gobiernos* (1947), pp. 82 and 223 ff.

The delegate of the Soviet Union in the Committee vetoed the admission of Transjordan,[3] Eire,[4] Portugal,[5] and Siam,[6] in each case on the ground that there were no diplomatic relations with the U.S.S.R. The discussion in the Security Council proved very clearly that all members of the Security Council, with the exception of the Soviet Union, considered that the question of diplomatic representation should not be taken into account in considering eligibility for membership.[7] The Soviet Union did not finally vote against the admission of Siam, in spite of the fact that it did not at the time entertain diplomatic relations with that state.[8]

It might be argued that admission to membership of the United Nations would in itself constitute implicit recognition of a government, and a proposal which might have had this effect was actually put forward by the Norwegian delegate at the San Francisco Conference.[9]

The question whether or not a state has armed forces at its disposal is not a decisive criterion for the decision whether or not it can be described as peace-loving! But it may be a point of importance in connexion with the question whether a state is able to fulfil its obligations under the Charter and also whether it is sufficiently independent. This question was discussed on the occasion of the admission of Transjordan and was included in the questionnaire addressed to that state.[10] Similarly, the question was discussed whether a state which remained neutral can become a Member of the United Nations. This question is different from that of whether neutrality is compatible with membership of the United Nations. The Potsdam Declaration definitely envisaged the possibility of admitting neutral members.[11] It is of interest to note that the United States delegate mentioned the neutrality of Afghanistan as a point in its favour,[12] while the Brazilian delegate praised the 'irreproachable neutrality of Portugal'.[1] The question whether or not a state was peace-loving was discussed only in one case, namely, that of Albania. The question whether a state is able and willing to fulfil its international obligations was also discussed in the Security Council in connexion with the admission of Albania.[2]

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[1] This great importance of diplomatic representation was brought out again and again by the Soviet delegate. See also the interesting passage in Byrnes, *Speaking Frankly* (1947), at p. 38.

[2] Security Council, *Official Journal*, First Year, Second Series, Suppl. 4, pp. 64–5.

[3] Ibid., p. 70.

[4] Ibid., p. 72.

[5] Ibid., p. 74.

[6] Ibid., p. 77.

[7] See in this connexion Security Council, *Official Records*, First Year, Second Series, for observations of the representatives of the United States (p. 55), France (p. 57), the United Kingdom (p. 90), Australia (p. 92), and the Netherlands (p. 92).

[8] Siam had expressed willingness to enter into diplomatic relations with the U.S.S.R.: see ibid., Suppl. 4, p. 147. Envoys have since been exchanged.

[9] See in this connexion the articles by Lauterpacht in *Columbia Law Review*, 45 (1945), pp. 815 ff., and 46 (1946), pp. 37 ff.; *Yale Law Journal*, 53 (1944), pp. 385 ff.; this *Year Book*, 22 (1945), pp. 164 ff.; the same, *Recognition in International Law* (1947); and Goodrich and Hambro, op. cit., pp. 82, 223 ff.

[10] See the questionnaire sent to Transjordan, *supra*, p. 96.

[11] See above, p. 91.

[12] See Security Council, *Official Records*, First Year, Second Series, Suppl., p. 67.

With regard to the internal régime of a state, the Security Council seemed to adopt the attitude that it could discuss the internal régime of a country in so far as that régime had a direct bearing on the question of the ability and willingness of the state to fulfil its international obligations, and particularly its obligations under the Charter. The Australian delegate took the view that the question whether the régime was sufficiently stable to ensure the fulfilment of treaty obligations must be considered.[3] Importance was attached to this question in the questionnaire presented to Albania.[4]

The question of the treatment accorded to refugees from countries belonging to the United Nations figured largely in the discussions concerning applications for membership. It was particularly mentioned with reference to the cases of Portugal[5] and Sweden.[6]

III. *The Security Council and the General Assembly*

Applications for membership before the General Assembly in 1946. The Rules of Procedure in the General Assembly are simple and easy to apply.[7] The General Assembly raised no difficulties with regard to the applications which had already been recommended by the Security Council. Both Committee I[8] and the Plenary Meeting[9] unanimously admitted Afghanistan, Iceland, and Sweden. Later, Siam was also admitted to membership by a unanimous vote.[1] This was also the case with regard to the admission of Yemen[2] and Pakistan.[3]

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[1] See Security Council, *Official Records*, First Year, Second Series, p. 110.

[2] See the relevant question in the questionnaire to Albania: ibid., Suppl. 4, p. 91, quoted above, p. 94.

[3] See ibid., p. 61.

[4] See ibid., pp. 94, 124. See also the discussion concerning the Mongolian People's Republic, ibid., pp. 123–4.

[5] See ibid., p. 73.

[6] Ibid., p. 77.

[7] '*Rule 113.* Any State which desires to become a Member of the United Nations shall submit an application to the Secretary-General. This application shall be accompanied by a declaration of its readiness to accept the obligations contained in the Charter.

'*Rule 114.* If the applicant State so requests, the Secretary-General shall inform the General Assembly, or the Members of the United Nations if the General Assembly is not in session, of the application.

'*Rule 115.* If the Security Council recommends the applicant State for membership, the General Assembly shall consider whether the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter, and shall decide, by a two-thirds majority of the members present and voting, upon its application for membership.

'*Rule 116.* The Secretary-General shall inform the applicant State of the decision of the General Assembly. If the application is approved, membership will become effective on the date on which the applicant State presents to the Secretary-General an instrument of adherence.'

[8] *United Nations Journal*, 1946, Suppl. 1, A/C.1, p. 2.

[9] United Nations Doc. A/64/Add. 1, p. 61.

The General Assembly, however, went further than merely accepting the positive recommendations of the Security Council. Some delegates were of the opinion that the Security Council had placed far too restrictive an interpretation upon Article 4 of the Charter. Others[4] contended that the Security Council had adduced considerations which were not covered by the terms of the Charter and had actually acted *ultra vires*. Despite some views to the contrary,[5] the majority of the delegates in Committee I felt that it was legitimate for the General Assembly to discuss the action taken by the Security Council in refusing to admit certain countries. The delegates of Egypt,[6] Panama,[7] and the Philippines[8] submitted resolutions to the effect that the Security Council should be asked to reconsider the applications. The Committee appointed a sub-committee to merge these proposals[9] and the report of the sub-committee[10] was eventually adopted by the Committee[11] and the Plenary Meeting[12] in the following form:[13]

> 'Applications for membership in the United Nations were submitted by the People's Republic of Albania, the Mongolian People's Republic, the Hashemite Kingdom of Transjordan, Ireland and Portugal;
>
> 'The Security Council, which examined these applications, has not made any recommendations;
>
> 'Since membership in the United Nations is open to all peace-loving States which accept the obligations contained in the Charter and which in the judgment of the Organization are able and willing to carry out these obligations, as stated in Article 4;
>
> '*Therefore, the General Assembly recommends* that the Security Council re-examine the applications for membership in the United Nations of the above-mentioned States on their respective merits as measured by the yardstick of the Charter, in accordance with Article 4.'[14]

The Australian delegate was dissatisfied with the entire procedure concerning admission of new Members and proposed a long resolution.[15] The outcome of the debate was that the following resolution was adopted by the Committee[16] and the Plenary Meeting:[17]

> '*The General Assembly requests* the Security Council to appoint a Committee to confer with a Committee of Procedure of the General Assembly, with a view to prepar-

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[1] Ibid., p. 198. [2] See above, p. 98. [3] See above, p. 99.

[4] For instance, Cadogan (United Kingdom) (A/C.1, p. 19), Fauzi (Egypt) (ibid., p. 2), Hasluck (Australia) (ibid., p. 26), and Koo (China) (ibid., p. 33).

[5] For instance, Lange (Poland) (ibid., p. 28).

[6] *General Assembly Journal*, 1946, Suppl. 1, A/C., p. 30.

[7] Ibid., p. 32. [8] Ibid., p. 26.

[9] Ibid., p. 20. [10] Ibid., p. 43. [11] Ibid., p. 45.

[12] Ibid., A/P.V., p. 335. [13] A/64, Add. 1, p. 61.

[14] The reception accorded to this proposal by the Security Council is described below, p. 108.

[15] A/C.1, p. 23, rev. 1.

[16] *General Assembly Journal*, 1946, Suppl. 1, A/C., p. 58.

[17] A/64, Add. 1, p. 62.

ing rules governing the admission of new Members which will be acceptable both to the General Assembly and to the Security Council.'[1]

The general debate at the beginning of the second Session of the General Assembly left no doubt as to the widespread dissatisfaction with the rejection by the Security Council of eleven out of seventeen applications for membership in the Organization. The First Committee, which discussed the problem thoroughly,[2] was flooded with draft resolutions.[3] Some of them proposed that the General Assembly should disregard the negative vote in the Security Council and admit applicants by a vote of the Assembly even against the negative vote of the Council.[4] Others requested that the Council reconsider certain applications since the considerations prompting rejection had been irrelevant to the provisions of Article 4 of the Charter.[5] It was also stressed that two of these states were in a special position,[6] since the one Great Power which had blocked their admission had itself admitted that they were eligible, but had voted against them for other reasons.[7] One delegate[8] proposed that the Security Council should be requested to reconsider the applications of these states[9] during the current session of the General Assembly.[10]

Three proposals are in a class by themselves. The first of these was the Swedish proposal[11] to request the Security Council to reconsider all the applications in view of the principle of universality.[12] The second was the Belgian proposal to ask the International Court of Justice for an advisory opinion concerning the interpretation of the Charter.[13] The third was the Polish proposal that one should refrain from voting on the different proposals but that the Committee (and not the General Assembly) should ask the permanent Members of the Security Council to reconsider their position and agree among themselves.[14]

The discussions proved that some delegates were of the opinion that it was possible for the General Assembly to disregard the negative vote of the Security Council. The Security Council could recommend, and the General Assembly was free to accept or reject the recommendation.[15] It was clear from the beginning, however, that this somewhat specious interpretation would not be adopted.[1] It was then submitted that the permanent Members of the Security Council had no right of veto with regard to the admission of new Members, since this question did not figure in Chapters VI and VII of the Charter.[2] This startling interpretation of Article 27 of the Charter also suffered an early defeat.[3] It was recognized that no resolution of the General Assembly would have much effect if the Great Powers did not forgo their right of veto.[4] The delegate of the United States expressed the willingness of his country to abstain from using the veto in questions of membership. He did not say whether in his view any Great Power had the right to dispose of its voting rights for the future in any group of questions.

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[1] Forty-ninth Plenary Meeting, November 1946, *General Assembly Journal*, Suppl., A–A, P.V., p. 337: the reception accorded to this proposal by the Security Council is described below, p. 108.

[2] In Meetings 98, 99, 100, 101, 102, and 103.

[3] These proposals will be found in Documents A/C.1, 183, 184, 185, 186, 212, 222, 239, 242, 243, 245, 246, 247, 248, 248 rev. 1, 249, 249 rev. 1, 250, 251, 252, 253, 254, 255, 256, 257, and 258.

[4] This applies to the resolutions submitted by the delegate of Argentina: ibid., 184, 185, and 222.

[5] This applies to the Australian resolutions: ibid., 245, 246, &c.

[6] Finland and Italy.

[7] A/C.1, 248 rev. 1, 249 rev. 1, 255, and 256.

[8] Turkey.

[9] Transjordan and Italy.

[10] A/C.1, 250 and 251.

[11] Ibid., 183.

[12] As to universality, see above, p. 100.

[13] A/C.1, 242.

[14] Ibid., 257.

[15] Arce (Argentina): A/C.1/SR. 98, p. 2.

Subsequently, the debates concentrated on three problems: the first was whether it was useful to ask the Security Council to reconsider the applications which had already been considered more than once. The answer was clearly in the affirmative. The General Assembly has established its right to try to influence the Security Council in this way. There is no evidence to show that the General Assembly will not use this right to the utmost. Thereafter, the First Committee discussed the question whether the Security Council had the right to take into consideration elements alien to those enumerated in Article 4 of the Charter. The general tendency was to urge that such factors ought not to be introduced. Thus the Australian delegate stated that the General Assembly was bound to accept the recommendation of the Security Council, but that the Security Council had the duty to conform to the Charter.[5] The American delegate stressed that the vote of Soviet Russia in the Security Council against Finland was 'the most flagrant violation of the Charter'.[6]

The result of the voting[7] was somewhat startling. It was agreed to ask the permanent Members to consult among themselves and to submit their conclusions to the Security Council.[8] At the same time it was decided to request an advisory opinion from the International Court of Justice[9] on the following question:

> 'Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Mem-

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[1] Evatt (Australia): A/C.1/SR. 99, pp. 5–9, and Stevenson (United States), ibid., pp. 110–12.

[2] Arce (Argentina): ibid., pp. 1 ff.

[3] See, *inter alia*, Lange (Poland) in Meeting 99, and Zafrulla Kahn (Pakistan) in Meeting 100.

[4] Ilsey (Canada): A/C.1/SR. 98, pp. 5–6.

[5] Ibid., 99, pp. 5 ff.

[6] Ibid., pp. 11–12.

[7] See A/471 and A/C.1/SR. 103.

[8] A/471, p. 5.

[9] Ibid., p. 6. And see the Note appended to this article on p. 112, below.

ber, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?'

In addition, the First Committee decided by large majorities to ask the Security Council to reconsider the applications of Eire, Portugal, Transjordan, Italy, Finland, and Austria since 'the opposition to the above mentioned applications was based on grounds not included in Article 4 of the Charter' and since the General Assembly found that these states are 'peace-loving within the meaning of Article 4 of the Charter' and that they furthermore are 'able and willing to carry out the obligations of the Charter, and should therefore be admitted to membership in the United Nations'.[1] As far as Italy and Transjordan are concerned,[2] it was even decided that the Security Council should be requested to reconsider the matter already during the current Session of the General Assembly. In the case of Finland[3] and Italy[4] it was added as an additional reason for reconsideration that the Great Power which had voted against those states had previously expressed the belief that the states in question were eligible for membership. Apparently, the First Committee[5]—and subsequently the General Assembly itself[6]—in the desire to press for membership of some states to some extent anticipated the Advisory Opinion of the International Court of Justice.

The two resolutions requesting the Security Council to reconsider the applications of Italy and Transjordan before the end of the current session of the General Assembly were transmitted to the Security Council and discussed by it at its meeting on 22 November. The meeting did not result in any positive action. It was clear that the permanent Members of the Security Council had not changed their opinion, and the matter was once more postponed and the hope expressed in a letter to the General Assembly[7] that the permanent Members would once more discuss the matter.

The questions of procedure raised in the debate on membership are of the greatest possible interest for the future of the Organization. Some of the questions were trivial, for example, whether the applications should be discussed in chronological order or in their alphabetical order in English. Nor is it of great importance whether they should at once be discussed by the Security Council as such, or, in the first instance, by a committee on which all the members of the Security Council are represented. It is clear that questions of procedure must be left to the organ concerned, to be decided by it as matters of pure detail.[8] But the relative importance of the parts played by the General Assembly and the Security Council in this matter is of considerable consequence. At one of the first meetings of the Security Council[1] Australia proposed that the applications should first be discussed by the General Assembly and then referred to the Security Council.[2] The arguments advanced by the Australian delegate were substantial. He urged in particular that the applications raised matters concerning the whole Organization which were outside the competence of the Security Council. The proposals were defeated. The words of the second paragraph of Article 4 seem, in fact, to indicate that the initiative rests with the Security Council. No state can be admitted without the recommendation of the Security Council.

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[1] As to Eire see A/471, p. 6; as to the other countries see ibid., p. 7.

[2] Ibid., p. 7.

[3] Ibid., p. 8.

[4] Ibid., p. 7.

[5] A/471.

[6] S/P.V. 221.

[7] A/513.

[8] It is not proposed to discuss here the difficult problems appertaining to the line of demarcation between procedural and other questions. This has now become one of the most burning

The resolutions adopted by the General Assembly concerning membership which have been discussed above raise other questions of principle. Has the General Assembly any right to discuss decisions taken by the Security Council on matters within its competence? This question was thoroughly debated at the San Francisco Conference.[3] Some of the Great Powers were reluctant to permit any such discussion, whereas most of the smaller states were of the contrary view. The same conflicts of opinion emerged at Lake Success and Flushing, in the autumn of 1946 and in 1947. Certain delegates welcomed a full and open debate,[4] whereas others felt that it was preferable to let the Security Council work out its own interpretation of the Charter.[5] The resolution asking the Security Council to reconsider the rejected application was, however, adopted by a comfortable majority,[6] and the Security Council decided to accept the resolution[7] although it was made clear by the President that the Council was under no obligation to do so.[8]

The conflict was even more apparent in the discussion concerning rules of procedure. It is clear that the Security Council can adopt its own rules of procedure.[9] In spite of this, the Council decided to participate in a joint committee with the General Assembly in order to reconsider these rules. The General Assembly was prepared to assert its authority, and the Security Council was at that time unwilling to engage in a conflict. It

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questions of the Organization, particularly on account of the embittered discussions concerning 'The Little Assembly' in 1947.

[1] See above, p. 92.

[2] See p. 92, n. 4 (from United Nations Doc. A/C.1/23/Rev. 1, Corr. 1, 4 November 1946).

[3] See Goodrich and Hambro, op. cit., pp. 94 ff.

[4] Hasluck (Australia), *United Nations Journal*, Suppl. 1, A/C.1, p. 26; Conally (United States), ibid., p. 4.

[5] Lange (Poland), ibid., p. 28.

[6] Forty-two votes, with one abstention in 1946: ibid., p. 45; and with substantially the same vote in 1947.

[7] See Security Council, *Official Records*, First Year, Second Series, p. 522.

[8] Ibid., p. 520.

[9] Charter, Art. 30: 'The Security Council shall adopt its own rules of procedure, including the method of selecting its president.'

adopted an attitude of moderation in face of the insistence of the Assembly that it 'will wield great authority and influence throughout all parts of the Organization and affect the development and basic policies of the entire Organization'.[1] The joint committee met in several sessions and prepared a report.[2] New rules for the Security Council were proposed[3] and, with very few changes, adopted by the Council.[4] Other rules were proposed for the General Assembly[5] and adopted.[6]

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[1] See p. 65 of the *Report* to the President by the United States delegate to the San Francisco Conference: U.S. Department of State publication 2349, Conference Series No. 71. This development in the status of the General Assembly is seen even more clearly in the Spanish question and in the question of the veto.

[2] A/384.

[3]

X. Admission of New Members

New Rule 58

Any State which desires to become a Member of the United Nations shall submit an application to the Secretary-General. This application shall (be accompanied by a declaration of its readiness to accept) *contain a declaration that it will accept* the obligations contained in the Charter.

Rule 59

The Secretary-General shall immediately place the application for membership before the representatives on the Security Council. Unless the Security Council decides otherwise, the application shall be referred by the President to a committee of the Security Council upon which each member of the Security Council shall be represented. The committee shall examine any application referred to it and report its conclusions thereon to the Council not less than thirty-five days in advance of a regular session of the General Assembly or, if a special session of the General Assembly is called, not less than fourteen days in advance of such session.

New Rule 60

The Security Council shall (decide) *consider* whether in its judgment the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter, and accordingly whether to recommend the applicant State for membership.

If the Security Council recommends the applicant State for membership, it shall forward to the General Assembly the recommendation with a complete record of the discussion.

If the Security Council does not recommend the applicant State for membership or postpones the consideration of the application, it shall submit a special report to the General Assembly with a complete record of the discussion.

In order to ensure the consideration of its recommendation at the next session of the General Assembly following the receipt of the application, the Security Council shall make its (recommendations) *recommendation* not less than twenty-five days in advance of a regular session of the General Assembly, nor less than four days in advance of a special session.

In special circumstances, the Security Council may decide to make a recommendation to the General Assembly concerning an application for membership subsequent to the expiration of the time limits set forth in the preceding paragraph. (United Nations Doc. A/384.)

[4] 'The Security Council resolves:

'1. That the Sub-committee of the Committee of Experts be instructed to negotiate with the General Assembly Committee for its acceptance of Rule 58 of the Provisional Rules of Procedure of the Security Council as tentatively revised by the Committee of Experts and its undertaking to effect necessary accompanying changes in Rules 113 and 117 (originally 116) of the Provisional Rules of Procedure of the General Assembly as suggested by the Committee of Experts; and, if the negotiation is not successful, to accept on behalf of the Security Council the change in Rule 58 as previously proposed by the General Assembly Committee;

'2. That, as regards proposals made by the General Assembly Committee concerning Rule 60

Notes 5 & 6 see p. 110.

Conclusions

It may be thought strange that in the first two years of its activity the Security Council should have recommended only six of the seventeen applicants for admission to membership. Many observers have felt, with some resentment, that the voting was mainly dictated by purely political reasons. It must now be considered whether this was in fact the case and whether the situation which has arisen is inconsistent with the terms of the Charter.

There has been much criticism of the action of Soviet Russia in using its veto on the ground of the absence of diplomatic relations. It was contended that this was not a relevant consideration. It is doubtful, in the light of the debates in the Security Council, whether this contention is justified. The absence of diplomatic relations may be significant. It may mean that the state in question has not attained a sufficiently advanced stage of development to be eligible for membership, or it may indicate a

of the Provisional Rules of Procedure of the Security Council, the following recommendations of the Committee of Experts be accepted:

(*a*) That the change of the word "decide" into the word "consider" in the first paragraph be not accepted;

(*b*) That the addition of two paragraphs as paragraphs 2 and 3 be accepted;

(*c*) That the change of the word "recommendations" from the plural to the singular be accepted;

'3. That the Sub-committee of the Committee of Experts be instructed to advise the General Assembly Committee that the proposed change in Rule 114 and addition of a new Rule 116 in the Provisional Rules of Procedure of the General Assembly are accepted.'
(United Nations Doc. S/P.V. 197, pp. 67–8.)

[5] New Rule 113

Any State which desires to become a Member of the United Nations shall submit an application to the Secretary-General. This application shall (be accompanied by a declaration of its readiness to accept) *contain a declaration that it will accept* the obligations contained in the Charter.

New Rule 114

(If the applicant State so requests) The Secretary-General shall (inform) *send for information a copy of the application to* the General Assembly, or to the Members of the United Nations if the General Assembly is not in session (of the application).

Rule 115

If the Security Council recommends the applicant State for membership, the General Assembly shall consider whether the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter, and shall decide, by a two-thirds majority of the Members present and voting, upon its application for membership.

New Rule 116

If the Security Council does not recommend the applicant State for membership or postpones the consideration of the application, the General Assembly may, after full consideration of the special report of the Security Council, send back the application to the Security Council, together with a full record of the discussion in the Assembly, for further consideration and recommendation or report.

Rule (116) *117*

The Secretary-General shall inform the applicant State of the decision of the General Assembly. If the application is approved, membership will become effective on the date on which the applicant State presents to the Secretary-General an instrument of adherence. (United Nations Doc. A/384.)

[6] A/482.

political outlook inconsistent with the principles and objects of the United Nations.

On the more general issue the following considerations seem relevant. The United Nations is not a club; it is a political organization. It is not to be expected that its decisions on important questions will be other than political. Undoubtedly there are legal questions which must be settled in accordance with legal principles. The institution of the International Court of Justice as the main judicial organ of the Organization is sufficient proof of this. But it is doubtful whether the question of admission to membership falls into this category. This is, indeed, one of the crucial problems of international organization. Once it is accepted that membership is not to be universal or automatic, it becomes clear that the relevant decisions may be based on political considerations.[1] Does the Charter permit political considerations to enter into the decision on applications for membership? The Charter lays down four conditions of membership —or five if one counts statehood.[2] The first is that the applicant must be peace-loving. This is a vague term, and it seems useless to try to define it. The second condition is that it must accept the obligations of the Charter. It means that the organ which is empowered to contract international obligations must give a declaration of acceptance.[3] The third is that it is able to carry out such obligations, and the fourth is that it is willing to do so. Both these last conditions are further defined by the words 'in the judgment of the organization'. These last conditions are not purely legal. The various Members of the Organization must all form their own opinion on this question. If it is considered that a state does not fulfil these conditions it would be wrong to vote for its admission. It would therefore seem that the Soviet and Australian opposition to the admission of all applicants *en bloc* was justified. It is understandable that some of the criteria adopted by certain members of the Security Council should have caused considerable surprise. On the other hand, it seems difficult to deny that there is some justification for taking political considerations into account in admitting new Members to the Organization. It was clear at San Francisco that the Organization was not, and was not intended to be, universal from the beginning. Only states which were considered worthy of membership were to be admitted. In view of the vagueness of the first condition—that a state must be peace-loving—and of the fact that widely different criteria may be applied with regard to the third condition, namely, ability to carry out its obligations, it is arguable that a wide discretion is left to the political judgment of the Member states. It is obvious that the 'judgment of the Organization' means the sum of the individual judgments of each Member of the Organization.

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[1] The discussions in the Legal Committee of the United Nations in 1947 concerning the position of the International Court of Justice were of great interest in this respect.

[2] The author does not consider it a condition to be a 'state': see *supra*, p. 101.

[3] This matter is covered by the new wording of Art. 58 of the Rules of Procedure of the Security Council.

Is it permissible to refuse admission to one state for the reason that other states are not admitted at the same time? It would be tempting to say that each applicant should be considered on its own merit, and that it was completely immaterial for the admission of State A whether State B were admitted at the same time or not. However, this answer seems to disregard the question whether a state is bound to give a reason for its vote or whether it is at liberty to vote in conformity with political expediency or not. The Soviet Union justified its vote on the ground that it was stated in the Potsdam Declaration that the states in question should be treated in the same way. The Potsdam Declaration—even though it be *res inter alios acta*—has considerable political significance.

It is possible to maintain with some justification that the results of the first two years of the practice of the United Nations in the matter are not alarming. Perhaps the striking feature of it is not that several applicants were rejected, but that it was possible for all the Members of the Organization to agree upon the admission of six states. It is reasonable for states to disagree as to the desirability of admitting another member of the community of nations into an organization for the defence of peace. It may be regrettable that any one state, by means of its veto, can prevent the admission of an applicant. But this is inherent in the system of voting in the Security Council and is not germane to the issue here discussed. Since the veto exists, it may be justifiable for a state to employ it. In fact, it is arguable that this is essentially a case for the use of the right of veto.

Note

At the time when the printing of this volume was in an advanced stage the International Court of Justice, on 28 May 1948, delivered the Advisory Opinion the request for which is referred to above, at p. 106. The Opinion was given by a majority of nine judges against six. It is convenient to summarize here the main points of the Opinion.

The majority stated, in the first instance, that the question before the Court was a legal question which the Court was competent to answer.[1] Concerning the argument that the Court could not interpret the Charter, the Court said: 'Nowhere is any provision to be found forbidding the Court, "the principal judicial organ of the United Nations", to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.'[2] Since this opinion was not contradicted by any of the dissenting judges, it seems to be established that the International Court of Justice is competent to interpret the Charter. The Court also observed that it was free to interpret abstract points of law.[3]

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[1] Reports of the International Court of Justice (to be cited here as *I.C.J. Reports*), 1948, p. 61.

[2] Ibid.

[3] Ibid.

On the substance of the question the Court was of the view that the request for an opinion did not refer to the actual vote cast by a Member:

> 'Although the Members are bound to conform to the requirements of Article 4 in giving their votes, the General Assembly can hardly be supposed to have intended to ask the Court's opinion as to the reasons which, in the mind of a Member, may prompt its vote. Such reasons which enter into a mental process, are obviously subject to no control. Nor does the request concern a Member's freedom of expressing its opinions. Since it concerns a condition or conditions on which a Member "makes it consent dependent", the question can only relate to the statements made by a Member concerning the vote it proposes to give.'[1]

The Court, after thus circumscribing the question, stated that it considered the text of Article 4 sufficiently clear to dispense with a recourse to the preparatory work.[2] The Court then said:

> 'The terms "Membership in the United Nations is open to all other peace-loving States which . . ." and "Peuvent devenir Membres des Nations unies tous autres États pacifiques", indicate that States which fulfil the conditions stated have the qualifications requisite for admisson. The natural meaning of the words used leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in Paragraph 1 of Article 4 must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.
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> 'Nor can it be argued that the conditions enumerated represent only an indispensable minimum, in the sense that political considerations could be superimposed upon them, and prevent the admission of an applicant which fulfils them. Such an interpretation would be inconsistent with the terms of paragraph 2 of Article 4, which provide for admission of "tout État remplissant ces conditions"—"any such State". It would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions. Such a power would be inconsistent with the very character of paragraph 1 of Article 4 which, by reason of the close connexion which it establishes between membership and the observance of the principles and obligations of the Charter, clearly constitutes a legal regulation of the question of the admission of new States. To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established.
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> 'Moreover, the spirit as well as the terms of the paragraph preclude the idea that considerations extraneous to these principles and obligations can prevent the admission of a State which complies with them. If the authors of the Charter had meant to leave Members free to import into the application of this provision considerations extraneous to the conditions laid down therein, they would undoubtedly have adopted a different wording.'[3]

On the other hand, the Court clearly emphasizes the discretionary character of the conditions for membership laid down in Article 4:

> 'It does not, however, follow from the exhaustive character of paragraph 1 of Article 4 that an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified. Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect

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[1] *I.C.J. Reports* (1948), p. 60.

[2] Ibid., p. 63. It is interesting to note that the wording used by the majority is practically identical with the phrase used by the Permanent Court of International Justice in *The Lotus* case: see *Publications of the Permanent Court of International Justice*, Series A, No. 10, p. 16.

[3] See *I.C.J. Reports* (1948), pp. 62–3.

with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no relevant political factor—that is to say, none connected with the conditions of admission.'[1]

For the reasons enumerated above, the Court's answer to the first question was in the negative. It followed from that answer that the answer to the second question was equally in the negative.

'Judged on the basis of the rule which the Court adopts in its interpretation of Article 4, such a demand clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category from those conditions, since it makes admission dependent, not on the conditions required of applicants, qualifications which are supposed to be fulfilled, but on an extraneous consideration concerning States other than the applicant State.'[2]

Several judges delivered separate Opinions. The principal separate Opinion is the Dissenting Opinion signed by Judges Basdevant, Winiarski, McNair, and Read. Their Opinion disagrees with the view of the majority on all points except on the question of jurisdiction. The four judges—and it should be noted that the other dissenting judges concurred in their Opinion—did not find the text clear. They therefore had recourse to the preparatory work relating to the Charter. They understood the question put to the Court in a different manner from the majority. They considered it to be quite clear that it was the vote itself that was in question. The dissenting judges said:

'In our opinion, it is impossible to regard the first question as one which relates solely to the statements or the arguments which a Member of the United Nations may make or put forward in the Security Council or in the General Assembly when those organs are considering a request for admission, and not to the reasons on which that Member bases its vote. The Court is asked whether a Member is 'juridically entitled to make its consent to the admission" dependent on conditions not provided for by paragraph 1 of Article 4. Its consent to admission is expressed by its vote. It is therefore the vote that is in question, as is confirmed by the expression "subject to its affirmative vote" used in the second question, which is complementary to the first. But it would be a strange interpretation which gave a Member freedom to base its vote upon a certain consideration and at the same time forbade it to invoke that consideration in the discussion preceding the vote. Such a result would not conduce to that frank exchange of views which is an essential condition of the healthy functioning of an international organization. It is true that it is not possible to fathom the hidden reasons for a vote and there exists no legal machinery for rectifying a vote which may be cast contrary to the Charter in the Security Council or the General Assembly. But that does not mean that there are no rules of law governing Members of the United Nations in voting in either of these organs; an example is to be found in paragraph 1 of Article 4 prohibiting the admission of a new Member which does not fulfil the qualifications specified therein. This distinction, which it has been attempted to introduce between the actual vote and the discussion preceding it, cannot be accepted; it would be inconsistent with the actual terms of the question submitted to the Court, and its recognition would involve the risk of undermining that respect for good faith which must govern the discharge of the obligations contained in the Charter (Article 2, paragraph 2).'[3]

The dissenting judges, furthermore, did not find any indication to the effect that the conditions enumerated in paragraph 1 of Article 4 of the Charter are exhaustive in the way understood by the majority. They said:

'The effect of paragraph 1 of Article 4—the only relevant text in this connexion—is that certain qualifications therein enumerated are required for admission, and that these qualifications are essential; but there is no express and direct statement that these qualifications are sufficient and that once they are fulfilled admission must of necessity follow.

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[1] *I.C.J. Reports* (1948), p. 63.

[2] Ibid., p. 65.

[3] Ibid., pp. 82–3.

'Not only does the paragraph not say this, but it does not even imply any such restriction; indeed quite the contrary is the case.'[1]

The answer given by the dissenting judges to the first question put by the General Assembly is so strikingly different from that of the majority that it deserves to be quoted in full:

> 'A Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State which possesses the qualifications specified in paragraph 1 of that Article, is participating in a political decision and is therefore legally entitled to make its consent to the admission dependent on any political considerations which seem to it to be relevant. In the exercise of this power the Member is legally bound to have regard to the principle of good faith, to give effect to the Purposes and Principles of the United Nations and to act in such a manner as not to involve any breach of the Charter.'[2]

It followed that the answer to the second question was also in the affirmative.

Judges Krylov and Zoričić, in their separate Dissenting Opinions,[3] expressed agreement with the Opinion of Judges Basdevant, McNair, Winiarski, and Read. However, they adduced a further consideration. In their opinion the Court—although undoubtedly competent—should have refused to answer the question put to it, since it was evidently a political one. Judge Krylov said:

> 'Appearances are deceptive: though framed in a legal form, it is a question put with a definitely political purpose; it is political in conception; though abstract in form, it is a concrete question which expressly refers in one of its paragraphs to the "exchange of views which has taken place in the Security Council at its 204th, 205th and 206th Meetings"; though impersonal in form, it is a question designed to censure the reasons given by a permanent Member of the Security Council.'[4]

Judge Zoričić expressed the same view.

The weakness of the majority Opinion—as the dissenting judges pointed out—is that it refers not to the vote but to the arguments adduced in favour of the vote. It inevitably leads to the conclusion that a Member can in fact vote as he pleases if he is careful not to reveal his motives. From this point of view the Opinion of the Court may not represent an entirely satisfactory solution. Both the majority and the minority agreed that there was a very wide scope indeed for discretionary appreciation of the conditions or qualifications laid down in Article 4. They all likewise agreed that the discretion—wide or narrow—must be exercised in good faith and in accordance with the Purposes and Principles of the Charter.

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[1] *I.C.J. Reports* (1948), p. 86.

[2] Ibid., p. 92.

[3] Ibid., pp. 94 ff. and 103 ff., respectively.

[4] Ibid., p. 94.

THE CONCLUSIVENESS OF THE 'SUGGESTION' AND CERTIFICATE OF THE AMERICAN STATE DEPARTMENT

By A. B. LYONS, M.A., LL.B.

In an article[1] in the last issue of this *Year Book* there was described the process by which, when a question of an international law nature arises in a case before an English Court, the parties apply to the Foreign Office to certify as to the relevant facts and the latter does so by means of either a formal certificate to the Court or a letter to the party inquiring. A similar practice obtains in the United States of America. Moreover, when an application of this kind is made to the Department of State, the reply is often conveyed to the Court by the medium of a procedural device known as a 'Suggestion'.[2] The purpose of the present article is to examine the object of the Suggestion, the manner in which it is used, and the extent to which it is binding upon the courts.

The Suggestion is a formal document[3] (not a pleading) which is filed by one of the parties to the case, by a consular or diplomatic representative of an interested foreign Power, or by a Law Officer of the United States at the instance of the State Department. It sets out the facts in issue and it comments thereon, sometimes at length. Its principal use seems to be in cases involving a claim of immunity by a state for its property. Most of the cases considered in this article are concerned with claims of immunity for ships alleged to be foreign public vessels; a few relate to the status or the recognition or non-recognition of foreign states.[4] In such cases, the

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[1] Lyons, 'The Conclusiveness of the Foreign Office Certificate', in this *Year Book*, 23 (1946), pp. 240–81.

[2] The Suggestion is not unknown to English law, but it may be regarded as practically obsolete, and was certainly never used in the way in which it is used in the American courts. Reference to the Suggestion is rare in English authorities. Wharton's *Law Lexicon* (14th ed., 1938) dismisses it as 'an entry of a fact on the record'. Byrne's *Law Dictionary* (1923) is hardly more helpful: 'Formerly, changes of the parties to an action in the King's Bench Division could be entered on the roll (or record of the proceedings in an action) by a "suggestion", that is to say, an allegation of them: and this made the Action continue in the name of the new parties so as to prevent abatement.'

Nor does the following entry, under the heading 'Suggestion', in a standard American legal dictionary, give much assistance: 'Information. It is applied to those cases where during the pendency of a suit, some matter of fact or circumstance which will materially affect or put a stop to the suit in its existing form, which for some reason cannot be pleaded . . . such as death or insolvency of a party. The Counsel of the other party announces the fact in Court, or enters it upon the record. The fact is usually admitted, if true, and the Court issues the proper order thereupon. See 2 Sellon Prac. 191.' (See *The Cyclopedic Law Dictionary*, 3rd ed. by Moore (1940).)

[3] A Suggestion is set out in full in *Anderson* v. *N.V. Transandine Handelmaatschappij et Al.*, 28 N.Y.S. 2d 547; *Annual Digest and Reports*, 1941–2, Case No. 4, at p. 21; and see *Columbia Law Review*, 40 (1940), at p. 454.

[4] In cases in which diplomatic immunity is claimed by a person asserting himself to be a diplomatic envoy, it appears to be the practice to apply to the Department of State for a certificate as to his status. In *U.S.* v. *Liddle*, 2 Wash. C.C. 205, it was held that the certificate of the

Court or one of the parties usually applies for assistance to the Secretary of State. The Secretary of State exercises discretion as to whether and in what way he will lend his assistance. The State Department may or may not appear by the Attorney-General;[1] it may write to the Court direct or to the parties; or it may file a Suggestion. On the other hand, the Court for its part may refer to extraneous sources. When the Court takes this course, it does not appear to be bound by any rule of best evidence. Often it will range farther afield than an English court would do in seeking to ascertain what the Executive thinks or has done in a given matter. Thus in dealing with the position of Austria subsequent to her annexation by Germany in 1938 the Court in one case[2] reviewed almost the whole history of that country. In another case,[3] in which the *Anschluss* was referred to, it examined such diverse acts of the Department of State as a 'Press Release' of the Secretary of State, immigration instructions as to aliens, and Treasury instructions relating to foreign property. Latterly, however, in cases concerned with claims of immunity from jurisdiction,[4] the Suggestion has come to be the accepted and regular procedural step.

The Suggestion of the State Department. The steps which have to be taken before a Suggestion of the State Department can come before the Court are a little involved, and not unvaried, although they usually follow a uniform pattern. When litigation has been commenced, or occasionally while it is only threatened, the ambassador of the foreign state affected presents a note to the Secretary of State[5] setting out the facts upon which

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Secretary of State was best evidence to prove diplomatic character. Cf. *In re Baiz* (1889), 135 U.S. 402. But the Court has had regard to other documents, see, for example, *U.S.* v. *Ortega* (1826), 4 Wash. C.C. 205, 11 Wheat. 467, U.S. L.Ed. 521. The status of consular officers has been called in question in many cases (more often, apparently, in the American than in the English courts). Here again a certificate of the Secretary of State is accepted by the Court, as in *Jay-Thorpe* v. *Brown* (1943), 43 N.Y.S. 28,278, *Kassar* v. *Ambarocy* (1943), 34 F. (2d) 722; but the Court appears to be free to admit evidence *aliunde*. Cf. *Van Clee and Arpels Inc.* v. *Varona* (1944), 49 N.Y.S. 2d. 472; *In re Flaum's Estate* (1943), 42 N.Y.S. 2d. 539; and see Hackworth, *Digest of International Law*, vol. iv, § 402.

[1] In *Molina* v. *Comision Reguladora del Mercado de Henequen* (1918), 91 N.J.L. 382, 103 Atl. 397, in which one of the Mexican states claimed immunity from suit, the Court communicated with the State Department which replied that it would not advise the Attorney-General to appear, for the reason that it did not believe that the claim of immunity was well taken. On which the Court made the following comment: 'This very sensible position of our Government makes it clear that the present case is free from any political complications, and leaves it to be determined purely as a legal question.'

[2] *Land Oberoesterreich* v. *Gude* (1940), 109 F. (2d) 635; *Annual Digest*, 1938–40, Case No. 34.

[3] *U.S. ex rel. D'Esquiva* v. *Uhl* (1943), 137 F. (2d) 903: *infra*, p. 128.

[4] As to cases involving claims of diplomatic immunity see p. 116, n. 4, *supra*.

[5] In the English case of *The Constitution* (1879), 4 P.D. 39, 48 L.J. (P.D. & A.) 13, which was a motion for leave to issue warrants of arrest against a United States warship, for salvage, the Court directed that notice be given to the American Minister and to the British Foreign Office. The former instructed counsel to appear to inform the Court of the status of the ship and her cargo, and to state that 'application would have been made to the Secretary of State for Foreign Affairs had time permitted'. He appears to have had in mind the procedure obtaining in the United States courts.

immunity is claimed, and requesting the Secretary of State to cause them to be conveyed to the Court.[1] The Secretary of State conveys to the Attorney-General of the United States a copy of the note, with a request that it be communicated to the Court, and that the Court be informed that the Department of State 'accepts as true' the statements of fact therein contained. In due course the communication is made to the Court as a Suggestion, most often by the United States District Attorney.[2] At the end of this rather roundabout procedure, the Court generally adopts the recognition by the Executive of the facts as disclosed in the Suggestion.[3] But occasionally, as will be seen,[4] the Court may have regard to other and opposing considerations, and reject the Suggestion entirely.

A survey of the history of this form of certification shows that over the past 150 years or so the American courts have fluctuated in the amount of weight and respect shown to the Suggestion of the State Department. But the Suggestion, it must be observed, is something more than a means of supplying authoritative information as to facts of which the courts are to take judicial notice.[5] In the earlier cases reviewed, the State Department has usually merely transmitted a claim to immunity, leaving it to the courts to examine the truth of the allegations of fact on which it is based. Since 1941, however, the Suggestion has become an affirmative announcement to the effect that the claim of immunity is well based.[6] This addition to the authority of the Suggestion is the more remarkable since it would appear that, in the American legal system, the formal distinction between the Executive and the Judiciary is more marked than in England, and the courts are, if anything, more conscious of this distinction than the English courts. Nevertheless, in some cases the courts have shown a tendency to insist that the State Department declare itself on a claim of immunity. In the absence of such a declaration the Court will read into a communication from the Executive a recognition or allowance of the claim which the Secretary of State may not have intended to imply.

Early uses of the Suggestion. The first case, reported in the Carnegie Edition of *Prize Cases decided in the United States Supreme Court*,[7] in which a Suggestion is mentioned, is *U.S.* v. *Peters* (1795).[1] A libel had been filed and process issued against an armed corvette belonging to the French Republic and one S. Davis, her commander. A motion for prohibition was founded on a Suggestion, not by the Executive, but by Davis, who 'gives this honourable Court to understand and be informed . . .', setting out the facts of the case, with its historical background, and also the relevant rules of international law; reciting treaties between France and the United States; and concluding that the corvette was the property of France.[2] However, it was the Suggestion of the State Department which was used in *The Schooner Exchange* v. *McFaddon and Others*,[3] the *locus classicus* of American cases on the immunity of state ships. On 30 December 1810 the *Exchange*, owned by McFaddon and another, was seized by order of Napoleon Bonaparte. It was then armed and commissioned, renamed the *Balaou*, as a public vessel of the French Government. In July 1811 it put in at Philadelphia and was libelled by the original owners. No claimant appeared, but 'Mr. Dallas, the Attorney of the United States for the District of Philadelphia filed (at the suggestion of the United States, it is believed) a suggestion that inasmuch as there was peace between France and the United States the public vessels of the former were exempt from seizure'. The version of the report in *Carnegie*,[4] while retaining the element of doubt as to who originated the Suggestion, shows that it contained rather more than the bare argument quoted and went into other matters. The *Carnegie* version commences as follows: 'Mr. Dallas . . . appeared, and (at the instance of the executive department of the government of the United States, as it is understood) filed a *suggestion* to the following effect', and then recites the state of peace between the United States of America and Napoleon; the fact that his public vessels enter ports and harbours freely; and that the *Balaou*, belonging to his said Royal and Imperial Majesty and employed in his service, entered Philadelphia under stress of weather. Mr. Dallas denied the seizure by Napoleon, but contended that if the vessel had been taken from the libellants, the property had become vested in Napoleon within a port of his Empire, out of the jurisdiction of the United States. He asked for the attachment to be quashed. All this was duly denied by the libellants, but the District Attorney produced affidavits by the French Consul verifying the commission of the captain, and the District Judge dismissed the libel. The libellants appealed, and the judgment was reversed. The District Attorney thereupon appealed to the Supreme Court. In the course of his long, learned, and famous judgment, Marshall C.J. said that the evidence of the fact that the *Exchange* was now a national armed vessel commissioned by and in the service of the Emperor of France was not controverted. He held that it was exempt from the jurisdiction of the Court, despite the fact that the title of the sovereign was notoriously wrongful. He added: 'If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney of the United States',[1] an indication, it may be, of some novelty at that time in the use of the Suggestion.[2]

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[1] In the latest cases noted, the request is that the Secretary of State shall inform the Court that he recognizes and allows the claim of immunity, and the Secretary of State so requests the Attorney-General. (See *infra*, p. 139.)

[2] In *The Ucayali* (1942), *infra*, p. 139, the Peruvian Government approached the State department in the ordinary way; the State Department sent a letter to the Court, and the United States Attorney filed not a Suggestion but a 'statement', which appears not to be the same thing.

[3] In *The Katinga Hadjipatera* (1941), *infra*, p. 129, the Court seems prepared to admit that the representation of fact of the foreign Minister embodied in the Suggestion of the State Department is itself proof of that fact.

[4] See p. 128, *infra*.

[5] See Oppenheim, *International Law*, vol. i. (6th ed. by Lauterpacht, 1947), p. 685.

[6] See p. 139, *infra*.

[7] Vol. i (1923), p. 81. In this article hereafter referred to as '*Carnegie*'.

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[1] 3 Dallas 121. Feller, 'Immunity of Foreign States in the Courts of the U.S.A.', in *A.J.* 25 (1931), points out (at p. 86) that the use of the Suggestion of the Attorney-General has been the practice in the Federal Courts since *The Cassius* (1796), 2 Dall. 365. According to a footnote in *Carnegie*, vol. i, p. 92, the proceedings in *U.S.* v. *Peters* in the District Court were superseded, but an information for illegal out-fit was filed against the *Cassius—Ketland qui tam versus the Cassius*, the case referred to by Feller. See L.Ed. 418: 'An information that had been exhibited against the *Cassius* . . . came to be argued upon a suggestion filed ex officia [*sic*] by the Attorney of the District in pursuance of a direction from the President stating that the vessel was the public property of the French Republic and that it was not liable to seizure and forfeiture.' (A footnote to *U.S.* v. *Peters* in Scott's *Cases on International Law* (1906), p. 700, is not without relevance to-day: 'The Circuit Court dismissed the proceedings on the ground that they must be taken in the District Court. No further action was taken in the Courts and . . . the question of International Law was left undecided. . . . The practical result was that a foreign ship of war was libelled and detained by the Courts of the United States and the Federal Executive seemed unable to prevent it.')

[2] The Suggestion was on oath: 'Sam B. Davis being duly sworn on his oath, doth say, that all and singular the facts by him in this suggestion are true' (*Carnegie*, vol. i, p. 85). Present-day Suggestions do not appear to be sworn.

[3] (1812), 7 Cranch, 116; Scott's *Cases on International Law* (1902), p. 208. Of the judgment of Marshall C.J., Oppenheim says that it 'may be regarded as the foundation of English and American Law on the position of State ships' (*International Law*, vol. i (6th ed. 1947), p. 763, n. 3).

[4] Vol. i, p. 370.

The filing of the Suggestion. Over a long period, the American courts were greatly exercised with the problem as to who was the proper party to file a Suggestion in a case where such a procedure was appropriate. There were three possible answers: the party to the action claiming immunity (immunity was the usual reason for the Suggestion); his home government by its diplomatic representative in the United States; or the State Department by the Attorney-General. But ultimately it became clear that the Court would consider only a Suggestion filed on behalf of the State Department. The question was raised in *Ex parte Muir*,[3] in which the Court preferred the third of the three courses above mentioned. The case involved a privately-owned ship requisitioned by the British Government. Counsel for the British Embassy appeared as *amicus curiae*[4] and filed a Suggestion that jurisdiction be declined as the ship was a government vessel in government service. The libellant objected that the Suggestion was not presented through official channels. It was held, on appeal, by the Supreme Court, with respect to the method of raising the objection of state immunity, that:

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[1] 7 Cranch, at p. 147.

[2] It is pointed out by Déak, 'The Plea of Sovereign Immunity and the New York Court of Appeals', in *Columbia Law Review*, 40 (1940), at p. 461, that *The Exchange* was almost the only case in which the Executive made an affirmative motion to dismiss for want of jurisdiction. Another such case was *Hassard* v. *United States of Mexico* (1903), 173 N.Y. 645, 66 N.E. 116.

[3] *Ex parte in the Matter of Muir, Master of The Gleneden* (1921), 254 U.S. 522, *Annual Digest*, 1919–22, Case No. 97. Before this case, the courts seem to have shown no preference for any particular method or procedure. See cases cited by Déak, loc. cit., at p. 457. Cf. *The Gul Djemal*, *infra*, p. 125, and see p. 121, n. 2, *infra*.

[4] In *Ervin* v. *Quintanilla* (1938), 99 F. (2d) 935, *Annual Digest*, 1938–40, Case No. 76, the Mexican Chargé d'Affaires appeared specially to suggest that a vessel libelled was a public ship and immune from seizure and the jurisdiction of the Court, and that depositions be not taken in

> '. . . the British Government could appear in the suit or raise the jurisdictional question; or its accredited and recognised representative might have appeared and taken the same steps in its interest; or that government could make the status and immunity of the vessel the subject of diplomatic representations, so that if the claim were recognised by the Executive Department, it might be set forth in an appropriate suggestion to the Court by the Attorney-General. That practice . . . makes for better international relations, conforms to diplomatic usage on other matters, accords to the Executive Department the respect due to it, and tends to promote harmony of action and uniformity of decision.'

The Suggestion as made could not be given the consideration and weight claimed for it. The new rule thus formulated, namely, that the Suggestion must come from the Executive, was adopted and followed in most of the cases which subsequently came before the New York courts. In these cases the Suggestions were expressed to be filed 'in accordance with the practice indicated by the Supreme Court in *Ex parte Muir*'. This continued until the case of *The Navemar*,[1] after which similar reference was made to that case.[2]

In *The Pesaro*,[3] a suit against an Italian vessel, the Supreme Court again denied the right of the foreign Government to make the Suggestion, and insisted that the Suggestion should come from the Executive after representations made through the diplomatic channel. The arrest was vacated in the District Court on a direct Suggestion by the Italian Ambassador that the ship was owned by his Government. It was objected, unsuccessfully, that this was an improper means of claiming immunity. In reply to an inquiry by the Court, the Secretary of State wrote: 'It is the view of the Department that government-owned vessels or vessels under requisition of

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the cause pending diplomatic representations—presumably he contemplated a Suggestion from the State Department. The District Court sustained the claim, and this was affirmed on appeal, the Court saying: 'The Suggestion was more in the nature of a suggestion *amicus curiae* which the District Court was at complete liberty to and which it did disregard. Nothing in it was or could be taken as an invocation of a submission to the jurisdiction of the Court. All that it amounted to was an informal suggestion that, pending the diplomatic representations, the matter should proceed no further in the Court.' In *Miller et Al.* v. *Ferrocarril, &c.* (*infra*, p. 136), the Nicaraguan Minister and the United States Attorney both appeared as *amicus curiae.*

[1] (1939), *infra*, p. 123.

[2] See *Columbia Law Review*, 40 (1940), p. 459. Feller, loc. cit., p. 83, points out that in *Ex parte Muir* (*supra*) the Federal Court disapproved of the established practice whereby a claim for immunity was brought before the Court by counsel for the foreign minister as *amicus curiae* or by Suggestion filed by the minister; that this ruling was not generally followed by the state courts; and that in *The Pesaro* (*infra*) the District Court held that the foreign diplomat could again appear without the consent of the Government of the United States. This decision was subsequently reversed by the Supreme Court: see *infra*, p. 123. Dr. Feller adds that the state courts did not normally follow the Federal practice of requiring a Suggestion to emanate from the Executive, and cites *Mason* v. *Intercolonial Railway of Canada* (1909), 197 Mass. 349, 83 N.E. 876.

[3] (1921), 277 Fed. 473; 255 U.S. 216; *Annual Digest*, 1919–22, Cases Nos. 94 and 95.

governments whose flag they fly, employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war.'[1] Ignoring this expression of opinion, Mack J. held that 'immunity should not be refused in a clear case simply because the Executive branch has failed to act'.[2] On appeal, the Supreme Court, reversing the decision, said:

> 'The suggestion was made directly to the Court and not through any official channel of the United States. It was accompanied by a certificate of the Secretary of State that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status, it gave no sanction to the suggestion. . . . The Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the Court to give effect to it. He called it a "Suggestion" and we think it was nothing more. . . . The Suggestion should [have] come through the official channels of the United States.'[3]

Similarly, it was held in *The Sao Vicente*[4] that the Portuguese Consul-General was not competent to appear and claim immunity for the ship by writ of certiorari. In the subsequent proceedings two years later,[5] on a libel for salvage, Counsel raised the defence of sovereign immunity in an answer verified by the Portuguese Vice-Consul-General. Exceptions to the answer were sustained, and the Court decreed in favour of the plaintiff. A Suggestion of immunity was then made to the Court by the Portuguese Minister, accompanied by a certificate from the United States Secretary of State that he was the Portuguese Minister, but assuming no responsibility for the contents of the Suggestion. The District Court refused to open its decree. An appeal to the Supreme Court was dismissed on the ground that

> 'the suggestion of immunity . . . was not made through the proper official channels. . . . That the public status of a ship cannot be determined on the mere suggestion of private control was decided in *Ex parte Muir*[6] . . . and that the Consul General of the Republic of Portugal is not competent merely by the virtue of his office to appear in Court and claim immunity for his government was decided in the *Sao Vicente* (1922). The suggestion of the Minister was presented to the Court too late, and should have been made to officials of the United States Government rather than directly to the Court.'[7]

This ruling was followed four years later in *The Secundus*,[8] when the Court emphasized the difference between the evidential value of a Suggestion by the interested foreign Government and that of one emanating from the State Department, and seemed to insist that the latter was essential and the former almost worthless. In this case the French Consul-General filed a 'Suggestion on Claim of Title to Motor Ship "Secundus" by the Republic of France', claiming immunity from seizure or detention. It was held by the District Court that the Suggestion was improperly filed. A new Suggestion was filed by the Republic of France through the diplomatic channel with an affidavit by the French Chargé d'Affaires. It denied the Court's jurisdiction and asserted ownership by the Republic. Attached was a certificate of the Secretary of State that the deponent was 'duly accredited to this Government as Charge d'affaires of France', but noting that 'for the contents of the [affidavit] the Department assumed no responsibility'. This caution on the part of the State Department in dissociating itself from the merits of the claim is a noteworthy feature of these cases at that time. It repeats the reservation made by the Secretary of State in *The Sao Vicente* (1924)[1] certifying the identity of the Portuguese Minister, and may have been inspired by the Court's remark in *The Pesaro*[2] that while the certificate filed in that case established the diplomatic status of the Italian Ambassador, it gave no sanction to the Suggestion. Eventually, in *The Secundus*, it was held that the Suggestion 'falls far short of the establishment of the sanction of our government to the alleged suggestion . . . the alleged suggestions are suggestions in name only'.

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[1] 277 Fed. 473, 479.

[2] Ibid., at p. 480.

[3] 255 U.S. 216, 218; *Annual Digest*, 1919–22, Case No. 94. Eventually the libel was dismissed by the District Court for want of jurisdiction (13 F. (2d) 468); affirmed by the Supreme Court *sub nom. Berizzi Brothers Co.* v. *The Steamship Pesaro* (1926), 271 U.S. 562; *Annual Digest*, 1925–6, Case No. 135.

[4] (1922), 281 Fed. 111; 260 U.S. 151; *Annual Digest*, 1919–22, Case No. 99.

[5] (1924), 295 Fed. 829; *Annual Digest*, 1923–4, Case No. 62.

[6] (1921), 254 U.S. 522.

[7] 295 Fed. 829, 832.

[8] (1926), 13 F. (2d) 469; 15 F. (2d) 711; *Annual Digest*, 1925–6, Case No. 136.

The vexed question of the value of a Suggestion filed by one of the parties to an action, or by a foreign state interested in the subject-matter of the action, was fully discussed in *The Navemar*.[3] In that case, however, these questions were bound up with the substantive question of possession and also with certain matters of high policy in regard to the rival Spanish Governments. The *Navemar*, a ship belonging to a Spanish corporation, was attached by decree of the Spanish (Republican) Government. The original owners brought an action to recover the ship. The Spanish Government seems to have preferred a claim of immunity through diplomatic channels, but it would appear that the Secretary of State refused to act on the claim by instigating a Suggestion that it had been recognized and allowed. The Spanish Ambassador then filed an application challenging the jurisdiction on the grounds that the *Navemar* was a public vessel in the possession of the Republic and not subject to the process of the Court, and asked to be allowed to appear specially to claim the ship.[4] The District Court denied the motion.[5] On appeal, the Circuit Court of Appeals reversed this decision, i.e. it dismissed the original action. On the question of who was the proper agency to invoke jurisdictional immunity, the Court held:

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[1] *Supra*, p. 122.

[2] *Supra*, p. 121.

[3] Really an intricate series of cases: *The Navemar* (1937), 17 F. Supp. 647; *The Navemar, Compañía Española de Navegación Maritima* v. *Crespo et Al.*, 18 F. Supp. 153; 302 U.S. 669, 90 F. (2d) 673; *Compañía Española de Navegación Maritima S.A.* v. *The Navemar*, 303 U.S. 68; 58 S. Ct. 432; 82 L.Ed. 667; 24 F. Supp. 495; 102 F. (2d) 444; 103 F. (2d) 783; *Annual Digest*, 1938–40, Case No. 68.

[4] See 17 F. Supp. 647.

[5] 18 F. Supp. 153.

> 'In filing the Suggestion through the Consul as his agent . . . and in seeking to intervene in the suit the Ambassador followed a permissible and adequate procedure, distinguishable from that which was held insufficient in the *Pesaro*[1] and *Ex parte Muir*. . . .'[2]

Then, as to the conclusiveness of the Suggestion, the Court said:

> 'The allegations of the Suggestion [as to public control of the vessel] we are bound to accept as conclusive. . . . It is not for us to examine the propriety or to determine the value of the decree affecting property within the foreign sovereign's dominion.'

But on appeal to the Supreme Court, the decree of the Circuit Court of Appeals was reversed[3] on the ground (*inter alia*) that the Court below had erred in accepting as conclusive the allegations contained in the Suggestion of the Spanish Ambassador.

> 'It is open to a friendly government to assert [the public status of a] vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the Courts of the United States. If the claim is recognised and allowed by the executive branch of the government, it is then the duty of the Courts to release the vessel upon the appropriate suggestion by the Attorney General of the United States.'

The Secretary of State having refused to act on the claim, the Ambassador had applied to appear and present the claim, and this had properly been admitted by the District Court; but the Court was not bound to accept the allegations as conclusive. The Department of State having declined to act, the want of jurisdiction, because of the alleged public status of the vessel and the right of the Spanish Government to demand possession, were appropriate subjects for judicial inquiry upon proof of the matters alleged. The Court made a noteworthy distinction between a Suggestion emanating from the Secretary of State and one filed by a party to the litigation.

> 'The filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This Court has explicitly declined to give the suggestion the force of proof, or the status of a like suggestion coming from the executive department of our governments. . . . The District Court concluded, rightly, we think, that the evidence at hand did not support the claim of the Suggestion that the *Navemar* had been in the possession of the Spanish government.'[4]

In this judgment, it should be remarked, the Court reached its conclusions in the absence of any declaration by the State Department of its relevant policies in the conduct of foreign relations.[5]

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[1] (1921), 255 U.S. 216. [2] (1921), 254 U.S. 522. [3] (1941), 302 U.S. 699.

[4] In effect, the Court denied immunity to the vessel on the ground that it was not shown to have been in the possession of the Spanish Government.

[5] It is pointed out by Déak, loc. cit., p. 460, that in declining to present a Suggestion of immunity, the Department of State is exercising judicial powers. 'A foreign government has requested

Judicial determination of the issue without invoking the assistance of the Executive. It is by no means unknown for the American courts to decide questions of fact of an international law nature without the Court or the parties having recourse to the Executive.[1] In such cases, notwithstanding previous insistence on a State Department Suggestion, the courts may accept representations, not Suggestions, from a party. In *The Republic of China*'s case[2] an action was brought by the National Government of China in the name of the Republic, which had not yet been recognized by the United States. In the Court of first instance it was contended that the plaintiff was an unrecognized Government and so had no capacity to sue. This was upheld, and the action was dismissed. Subsequently, the United States concluded a Treaty of Commerce with the National Government,

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executive action on its claim for immunity: in determining not so to act, the executive is exercising powers belonging to the judiciary.' See on *The Navemar* generally, *Columbia Law Review*, 37 (1937), p. 656.

[1] In *In re Taylor* (1902), 118 Fed. 196, Great Britain sought the extradition of Taylor under a treaty with the United States for a crime committed in South Africa prior to the Boer War. The United States Ambassador in London certified that South Africa had been part of the British Empire at the material date. On the argument that it could not go behind this, the Court said: 'If the legislative or executive department of the Government has taken action regarding the diplomatic or international status of any place or country, this Court is ordinarily bound by that action. But it is bound, also, to inquire what that action has been. . . . The Court does not . . . refuse to take action for fear that its decision may not be approved thereafter by the legislative or executive department.' The Court noted that Consuls were sent to Pretoria, described as within the 'South African Republic'. The Department of State informed the Court that exequaturs were granted by the Republic. The Court studied the history of the relations between the Republic and Great Britain and decided that the Republic was not part of Great Britain and that Great Britain was not entitled to claim extradition under the Treaty.

More recently, in *De Simone* v. *Transportes Marítimos do Estado* (1922), 199 App. Div. (N.Y.) 602; 200 ibid. 82; *Annual Digest*, 1919–22, Case No. 145, an action for goods sold, defendants claimed to be a department of the Portuguese Government and consequently entitled to immunity from suit. This was verified only by the Portuguese Vice-Consul and, on appeal, it was held that the claim to sovereignty must be considered, however it may have been presented. However, in *The Sao Vicente* (1922), *supra*, p. 122, a claim for supplies and labour furnished to vessels belonging to the defendants in the case last noted, writs of certiorari were issued from the Supreme Court on the petition of the Consul-General of Portugal; but it was held 'The Consul-General is not a party to the proceedings . . . and is not competent merely by virtue of his office, to appear here for his government and claim immunity from process in the manner attempted'. The subsequent proceedings in this case are dealt with at p. 122, *supra*.

If a Consul-General was not competent to present such a claim, still less so, it would appear, was the master of a merchant ship. In *The Gul Djemal* (1924), 264 U.S. 90, the master of a ship owned by the Turkish Government claimed immunity when his ship was libelled. At this time the United States had no diplomatic relations with Turkey, although the two countries were at peace. The Secretary of State refused to make a Suggestion of immunity, on the ground that the master was not an accredited and responsible representative of his country. The Supreme Court refused to grant immunity, under the rule in *Ex parte Muir* (*supra*, p. 120). However, in an unreported judgment, Knox J. gave as his reason for denying immunity that 'as diplomatic relations between the United States and Turkey were then severed . . . the comity and courtesy due from this country to Turkey did not, in the absence of an appropriate Suggestion from the State Department of this Government, require the extension of such immunity' (cited from *Transcript of Record on Appeal*, p. 42, by Jaffé in his *Judicial Aspects of Foreign Relations* (1933), at p. 155).

[2] *The Republic of China* v. *Merchants' Fire Assurance Corporation of New York*; *The Same* v. *Great American Insurance Co.* (1929), 30 F. (2d) 278 (C.C.A.); *Annual Digest*, 1931–2, Case No. 45.

and received a diplomatic representative. The Circuit Court of Appeals thereupon held that the judgment of the Court below should be reversed on the ground that the conclusion of a treaty, even though not yet ratified by the Senate, and the reception of a diplomatic representative, afforded clear evidence of the recognition of the National Government by the Executive Department of the United States Government. This, said the Court, 'would seem to satisfy the requirements of the law'.[1]

The same procedure has been resorted to in very recent cases. In *Land Oberoesterreich* v. *Gude*,[2] already noted,[3] the issue was whether the plaintiffs, the Province of Upper Austria, had the capacity to sue in a federal court. The defendants offered a letter from the Department of State in proof of their contention that the plaintiff province had no *locus standi*; but the Court preferred to review the facts of the case—the history of the Austrian Province and the succession of the Third Reich. It concluded that 'the change has occurred in a manner acceptable to our notions of International Law', and added as an afterthought, 'The Anschluss has in no wise been disavowed by the Department of State.'

Similarly, in *Fields* v. *Predionica*[4] the New York State Supreme Court dispensed altogether with the services of the State Department and was able to decide the question of immunity (of state-owned goods) before it by reference to general rules of comity. The case was an appeal by the Yugoslav Government against a judgment of the New York State Court, denying its motion to appear specially to assert its rights in respect of certain cotton attached by the plaintiff from the cargo of a Yugoslav steamship in New York. One V.R., alleging that he was Counsellor of Legation of the Royal Yugoslav Government in London and its Minister in Washington, intervened to claim immunity. He set out his own position and that of the ship, which, together with the cotton and other part of its cargo, was, he contended, immune from attachment by private individuals. It was held that the motion must be granted. The Court observed that there were sufficient facts on the record that a friendly nation asserted ownership to the goods; that there was no Suggestion to the Court from the Executive Department of the Government recognizing the validity of the Yugoslav claim; and that there had been no appearance of any Law Officer of the

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[1] In *Banque de France* v. *Equitable Trust Co.* (1929), 33 F. (2d) 202; *Annual Digest*, 1929–30, Case No. 22, the Federal Court refused to allow an action *quasi-in-rem* against the funds of the Soviet in a bank in America. The Court was not troubled by the absence of a Suggestion of immunity from the Department of State, since the plaintiff attempted to garnish the funds as the funds of a foreign government, and the Court held that on the very face of the allegation they were immune.

[2] (1940), 109 F. (2d) 635; *Annual Digest*, 1938–40, Case No. 34.

[3] *Supra*, p. 117.

[4] *Fields* v. *Predionica I Tkanica A.D.* (No. 1) (1941), 31 N.Y.S. 2d. 739, 263 App. Div. 155; *Annual Digest*, 1941–2, Case No. 54.

Government. Nevertheless, the Court held that the Yugoslav Government had followed correct procedure:

> 'Where a claim of immunity is recognised and made known by the Executive branch of our own government, it is then the duty of the Court to grant immunity without further proceedings. But even without such intervention by a Government, a foreign sovereign would seem to be entitled as a matter of comity, upon a proper showing, to appear specially in a pending suit and there assert its claims.'

In the No. 2 case[1] the District Court decided that the Yugoslav Government could try to prove its title (by requisition) to the cotton on the merits. In the judgment on appeal from this decision the Court said: 'No representation has been made to this Court by the Executive Branch of our Government as to the merits of the claim of requisition; accordingly this question remains open for judicial determination.' Having found that a valid requisition had taken place, the Court felt 'bound by the rules of comity applicable to a friendly nation, to hold that this cotton is free from attack'.[2]

Again, in *The Ljubica Matkowic*,[3] the Supreme Court found itself unperturbed by the absence of a Suggestion from either the State Department or the parties. An action was commenced against a ship for wages, and the Yugoslav Minister to the United States filed a petition claiming immunity for the ship as a government vessel. The Court first held that the Department of State recognized the intervenor as Minister of Yugoslavia (without stating on what evidence) and, after referring to the *Navemar* case[4] said: 'the executive branch of the Government of the United States made no suggestion to the Court, but the foreign government through its ambassador asserted ownership of the vessel and denied the jurisdiction of the United States'; and this seems to have been thought sufficient.

As has been seen in the *Land Oberoesterreich* case,[5] the Court will, in furtherance of its declared desire and duty to be guided by the wishes and intentions of the Executive, often seek for evidence of these in every available way short of direct inquiry, sometimes resorting to such inquiry only as an afterthought. The fact is that American rules of evidence permit a

[1] (1942), 35 N.Y.S. (2d) 408; 37 N.Y.S. (2d) 874 (265 App. Div. 132); *Annual Digest and Reports*, 1941–2, Case No. 55.

[2] Similarly, in *The Uxmal* (1941), 40 F. Supp. 258, *Annual Digest and Reports*, 1941–2, Case No. 59, an action against a Mexican ship, the Mexican Ambassador intervened, petitioning for its dismissal. He alleged that the ship was the property of and controlled by the Republic of Mexico, and employed in the public service through the Henequerenos of Yucatan, one of the Federated States of the United States of Mexico. It was held that the petition of the Ambassador alone was sufficient to present a claim; but it must be proved that there is ownership, that there is a right to possession, and that the ship is in the public service. 'The mere suggestion is not sufficient proof.' The use of the word 'Suggestion' here is not clear.

[3] (1943), 49 F. Supp. 936.

[4] *Supra*, p. 123.

[5] *Supra*, p. 126.

latitude which must often shock an English lawyer; speeches in Congress, diplomatic correspondence, presidential messages, are all fully admissible,[1] and this may help to explain why it is not yet part of the settled, invariable procedure of the American courts to apply direct to the Executive for information. They have so many other sources available.[2]

Judicial determination in disregard of the Suggestion of the Executive. Although American courts have generally shown themselves anything but subservient to the Executive,[3] as regards questions of immunity it would appear that they have latterly resigned some of their independence. However, they have held their ground where the Executive has seemed to venture on the domain of purely legal questions. In such cases the Executive is ignored and its Suggestion overruled. For example, in *Cunard* v. *Mellon*,[4] the Attorney-General of the United States gave an Opinion that the Eighteenth Amendment to the National Constitution and the National Prohibition

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[1] The nineteenth-century cases abound with examples, such as *Kennett* v. *Chambers* (1852), 14 Howard 38; *William Gray* v. *United States* (1886), 21 Ct. of Claims 340, Scott, *Cases*, 452; *Re Ross* (1890), 140 U.S. 435, Scott, *Cases*, 238; *U.S.* v. *Trumbull* (1891), 48 Fed. 94; *The La Ninfa* (1896), 75 Fed. 513, Scott, *Cases*, 443; *The Three Friends* (1896), 166 U.S. 1.

[2] This is well exemplified by *D'Esquiva*'s case, an action for habeas corpus, where the question was whether the relator was an alien enemy. He was born in Vienna in 1891 of Austro-Hungarian parents. In 1919 he went to France, and in 1939 came to the United States. In 1940 he described himself as a citizen or subject of Austria. The respondent contended that by reason of Austria's incorporation with the Reich in 1938, D'Esquiva became a 'native' and a 'citizen' of Germany. The Court (on appeal) held that the respondent was wrong, as D'Esquiva had lived in France and never accepted the sovereignty of the invader, but had remained a native of Austria. The Court then considered whether Austria was recognized as a component part of Germany, and for that purpose referred to the acts of the State Department with regard to the Austrian *Anschluss* of 1938. The Court quoted a letter of 9 May 1938 from the Secretary of State to the Attorney-General, in response to the latter's inquiry as to what diplomatic recognition was given by the United States Government to the incorporation of Austria into the German Reich. The letter set out the text of two Notes delivered to the German Foreign Minister on 6 April 1938 by the American Ambassador in Berlin, relating to the closing of the United States Legation in Vienna and its replacement by a Consulate-General (as the Republic of Austria had ceased to exist as an independent State). The Court regarded the letter as 'some evidence' that the United States recognized the 'consolidation' of Austria into Germany. The Court also referred to United States statutes abolishing the Austrian immigration quota. The appellant relied on a 'Press Release' of the Secretary of State, dated 27 July 1942, setting out the Government's opinion on the seizure of Austria, and saying: 'The Government has never taken the position that Austria was legally absorbed into the German Reich', and contended that this 'further clarification', even though made after the decision in the Courts below, must be considered by the Court of Appeal. The Court did not find it decisive or clear. But it went on to consider immigration instructions as to classification for naturalization purposes of aliens of Austrian nationality, and Treasury Department instructions relating to foreign property, distinguishing between Austria and Germany. Finally, and only finally, the Court ordered further inquiry to be made into the recognition accorded to the absorption of Austria by Germany, saying: 'we might address our enquiries to the Department of State', but thought it better to remand this inquiry to the courts below (*United States ex rel. D'Esquiva* v. *Uhl, District Director of Immigration* (1943), 137 F. (2d) 903).

[3] See, for example, *The Ambrose Light* (1885), 25 Fed. 408. In this case, although the Secretary of State expressly affirmed that the United States had not recognized the belligerency of the insurgent group, the Court held that there may have been no recognition 'in a formal sense', yet in view of certain correspondence which had passed with Colombia, there was recognition 'in a real sense' of the insurgents as belligerents.

[4] *Cunard Steamship Co. et Al.* v. *Mellon, Secretary of the Treasury, et Al.* (1923), 284 Fed. 890; 285 Fed. 79; 262 U.S. 100; Dickinson, *Cases*, 449; *Annual Digest*, 1923–4, Case No. 57.

Act made it illegal for any ship, domestic or foreign, to bring intoxicants into United States territorial waters, or for any United States ship to carry liquor, even outside territorial waters. Nevertheless, in an action brought by foreign shipping companies to restrain the threatened application of this construction of the two legislative enactments mentioned, the Supreme Court appears to have ignored the opinion of the Attorney-General. Basing its decision on first principles only, it held that while the legislation applied to all ships in American waters, it did not apply to United States ships outside territorial waters.

Nearly twenty years later, in two cases involving the legal position of certain Greek ships, the Suggestion of immunity of the State Department was similarly ignored by the United States District Court. In *The Anghyra*[1] the Greek Minister to the United States claimed immunity for a Greek merchant vessel alleged to have been requisitioned by the Greek Government. The Secretary of State in his Suggestion to the Court had said that 'the Statements of the Government of Greece . . . are brought to the attention of the Court as a matter of comity between the Government of the United States and the Government of Greece'. The Greek Minister alleged that the vessel was in the possession of the King of Greece. However, the Court accepted evidence that at the time of the alleged requisitioning the vessel was actually in the possession of a United States Marshal.

In *The Anghyra* there was a clear error of fact which, once discovered, may have made the rejection of the Suggestion inevitable. But shortly afterwards, the same Court went a second time behind the Suggestion to discover a fine legal distinction on which the Suggestion could be overruled. In *The Katingo Hadjipatera*[2] a writ was issued against the vessel; the United States Government filed a Suggestion of immunity; and the Greek Government filed a motion for dismissal of the writ and delivery of the vessel to its agent. The Court held that the Suggestion of immunity must be overruled and the motion denied. Although the representation of the Greek Minister to the Secretary of State that the ship had been requisitioned by the Greek Government was held to be proof of that fact, in view of the filing by the Attorney-General of the Suggestion of immunity which embodied the statement of the Greek Minister, yet, on examining the evidence as to facts, the Court found that the requisition went to the use or possession of the ship, and not to its title. This decision was upheld successively by the Court of Appeals and the United States Supreme Court.[3]

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[1] *The Anghyra, Brown and Williamson Tobacco Co. et Al.* v. *S.S. Anghyra et Al.* (1941), A.M.C. 1495; *Annual Digest and Reports*, 1941–2, p. 223.

[2] (1941), 40 F. Supp. 546; 119 F. (2d) 1022; 313 U.S. 593; *Annual Digest*, 1941–2, Case No. 57.

[3] See, however, *The Ioannis P. Goulandris*, *infra*, p. 135, another 1941 Greek requisitioning case, where the Court asked the United States Attorney whether the transmission of the Greek

The Suggestion of the State Department as a mere 'conduit pipe'. It is interesting to observe how the cautious reservation noted in *The Sao Vicente*[1] and *The Secundus*,[2] where the Department of State 'assumed no responsibility' for the contents of the affidavit or Suggestion of a foreign diplomatic officer, develops in time, and for a time, into a courteous renunciation of initiative. The Department is a mere conduit pipe, conveying a plea, a request, and explicitly leaving it to the Court to adjudicate thereon. This idea is developed in two cases in the New York State courts. For example, in *Hannes*' case,[3] a plea of immunity was entered by the defendant corporation, which was created and owned by the Kingdom of Roumania. The United States Attorney appeared at the suggestion of the Secretary of State to transmit (that is the word now used) to the Court the plea of immunity 'for such consideration as the Court may think proper'. He called attention to the comity existing between civil governments, in accordance with the procedure indicated by the Supreme Court in *Ex parte Muir*.[4] The New York State Court declined jurisdiction, but its judgment was reversed on appeal on the ground that, apparently, transmission was not enough. The Court said: 'As the executive branch of our government does not indicate that it takes any position as to Roumania's claim of Sovereignty, this Court must determine such claim in the manner it deems proper on the facts and the law.'[5]

Even more explicit was the State Department's disavowal in *Lamont* v. *Travelers Insurance Co.*,[6] an action for the rendering of a voluntary account brought by the International Committee of Bankers of Mexico, concerning the reorganization and readjustment of Mexico's public debt. The Government of Mexico appeared specially to assert its sovereign immunity.

Minister's note constituted an acceptance of the facts recited therein. When, after some further correspondence, the Department of State was able to reply in the affirmative, the Court based its decision on that reply. In *The Ucayali*, *infra*, p. 139, a Statement filed by the United States Attorney in support of a plea of immunity for a Peruvian public vessel was overruled by the District Court, but this decision was reversed on appeal.

[1] *Supra*, p. 122.

[2] *Supra*, p. 122.

[3] *Hannes* v. *Kingdom of Roumania Monopolies Institute* (1938), 6 N.Y.S. (2d) 960; (1940), 20 N.Y.S. (2d) 825; *Annual Digest*, 1938–40, Case No. 72. In a note on 'Immunity from Jurisdiction of Foreign Sovereigns, Instrumentalities and Obligations', in *Yale Law Journal*, 50 (1941), pp. 1088–93, it is pointed out that immunity had been more freely granted to foreign public ships, governmental corporations, &c., by the American than by the continental courts. The author of the note regards these later cases, and in particular *Ulen*'s case (*infra*, p. 132) and *Sullivan*'s case (*infra*, p. 133), as part of a reversal of this process. He calls it 'a procedural attack on the doctrine of immunity'.

[4] *Supra*, p. 120.

[5] See the Note to this case in *Annual Digest*, 1938–40, at p. 201: 'New York Courts . . . now appear to view the usual "suggestion" as no more than an alternative to a special appearance by which the Sovereign indirectly lays its claim before the Court for its independent determination. On this view, the State Department becomes a mere "conduit". Mere transmission of the claim by the Executive is not termed a "certification".' Probably the Note fails to take into account the variation in wording of the communication transmitting the claim.

[6] (1938), 5 N.Y.S. (2d) 295; (1939), 281 N.Y. 362; *Annual Digest*, 1938–40, Case No. 73.

Diplomatic representations were made to the Secretary of State, who requested the Attorney-General to file a Suggestion concerning the assertion of sovereign immunity by Mexico. In his Suggestion the Attorney-General said:

> 'In bringing this matter to the attention of the Courts, I do not appear either for the United States or for the Government of Mexico . . . but I present the suggestion as a matter of comity between the Government of Mexico and the United States Government for such consideration as the Court may deem necessary and proper.'[1]

In other words, the Suggestion was a mere assertion without proof that the property belonged to the foreign Government, leaving the Court free to examine the claim. On appeal the New York Court of Appeals pointed out in the course of its judgment that 'no issue is raised merely by the suggestion of a government which refuses to intervene and to present proof to sustain its allegation'; and that 'immunity from Suit exists only where the object of the Suit is to enforce a claim or right against the foreign government or its property'. Here the United States Attorney had done no more than to 'present' the Suggestion of immunity at the request of the Secretary of State following diplomatic representations made on behalf of the Government of Mexico; and it seemed plain that such a presentation of a Suggestion did not indicate that 'the Executive branch of our Government has recognised and allowed the claim of the Government of Mexico'. The Court remained free[2] to give to the claim of immunity such consideration as it deemed necessary and proper.[3]

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[1] The Suggestion is set out in full in *Columbia Law Review*, 40 (1940), at p. 454.

[2] Professor Déak (loc. cit., at p. 463) comments on this case that the Court seems to suggest that it should have power to inquire into the truth of the allegations on which the claim of immunity rests, unless the Executive makes an affirmative pronouncement in respect of them. It is difficult to see what objection can be raised to such a suggestion, unless the Court is to abdicate its functions to the Executive as soon as a plea of immunity is raised. Déak also complains that in *Lamont*'s case the Court of Appeals 'threw overboard' the practice followed since *Ex parte Muir* (*supra*, p. 120) of requiring the Suggestion of immunity to come from the Executive. It is submitted that he is overstating matters. He adds (at p. 464), no doubt correctly, that 'suggestions are not filed indiscriminately', but continues, 'they make for co-operation of executive and judiciary'. This surely depends on their wording. And it is not easy to follow the learned writer's meaning when he says that 'this happy co-operation' continued 'until *Lamont*'s case which offered no substitute'.

[3] Cf. Note in *Annual Digest*, 1938–40, p. 213, as to the effect and function of a Suggestion, pointing out that [previously] the Courts had considered that a Suggestion precluded them from examining the facts alleged therein. Now the New York Court of Appeals had held that the Court might inquire into the truth of the allegations on which the claim of immunity rests, unless the Executive, in addition to certifying the fact that the claim of immunity is made by a foreign sovereign, makes an affirmative pronouncement with respect to these allegations. 'The mere transmittal of a Suggestion by the Department of State is not such a recognition and allowance of the claim of immunity as to be binding on the Court, but is a mere assertion without proof that the property in question belonged to the foreign sovereign, leaving to the Court the problem of examining the claim.' And see the articles cited in the Note *ad fin.* But it was not long before the Court ceased to be satisfied with a 'mere transmittal' and bent its energies to obtaining an 'affirmative pronouncement'. See, for example, *Sullivan*'s case (1941) (*infra*, p. 133), where the Court held that the very fact that the State Department thought fit to transmit a protest was evidence that it regarded the issue as substantial. (Another view is that the Suggestion had hitherto

In some subsequent cases the State Department continued in its attitude of 'courteous neutrality', which was acknowledged by, at least, the Courts of New York State. They responded by holding that bringing a foreign Government's claim of immunity to the attention of the Court was not a recognition of the claim by the State Department, and would not preclude the Court from determining, in its own way, the question of jurisdiction. For example, in the *Ulen* case[1] the defendant Bank (a state institution) and the Polish Government appeared specially, and moved to set aside the complaint on the ground that the Bank was entitled to sovereign immunity. The Polish Ambassador communicated with the Secretary of State of the United States, calling attention to the pending action, asserting that the defendant claimed immunity from suit as 'an instrumentality of the Republic of Poland', and requesting that the Secretary of State advise the Court of the position taken by the Polish Government. The Secretary of State requested the Attorney-General to instruct the United States Attorney to appear before the Court and present the Polish Government's position

> 'without argument or comment . . . other than to state that the statements of the Government of the Republic made in its behalf by the Polish ambassador at Washington are brought to the attention of the Court as a matter of comity between the United States and the Republic of Poland, a sovereign state duly recognised by the United States.'

On the motion to dismiss, a written statement complying literally with these instructions was handed to the Supreme Court, King's County, who granted the Motion. On appeal to the Supreme Court of New York, the Order was reversed, the Court saying: 'It is urged that the action of the State Department (in presenting a suggestion to the Court) amounted to a recognition and allowance of Defendant's claim to immunity by the executive branch of the United States Government.' If this were correct, the Court would be obliged without further inquiry to accept the claim of immunity and to decline jurisdiction. 'But', the Court continued, 'the State Department did not undertake to recognise the claim as valid or to influence the Court. It took a position of courteous neutrality. This left the Court free to determine the question of jurisdiction, uninstructed by the executive branch of the government. The question is before us on the merits.'

The Suggestion of the State Department as an 'Instruction'. The judgments in the next group of cases give the impression that the Court is

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relieved a foreign sovereign from the ordinary obligation of a private litigant to prove his case, but in *Lamont*'s case the Court refused to give such weight to a Suggestion: cf. *Columbia Law Review*, 40 (1940), p. 459.)

[1] *Ulen & Co.* v. *Bank Gospodastwa Krajowego* (*National Economic Bank*) (1940), 24 N.Y.S. (2d) 201; *Annual Digest*, 1938–40, Case No. 74.

quite ready to be 'instructed by the executive branch of the government' if only the State Department uses the right form of words. In *Sullivan*'s case,[1] for instance, the Court admitted the recital of facts made by the foreign Government and 'accepted as a true statement' by the Executive, but felt that it must inquire whether the conclusion of immunity drawn by the Executive from these facts was of the kind which the Court must accept as final. The Federal Court went farther than this, and actually entered into 'informal' correspondence with the State Department in an attempt to obtain something more than a mere neutral 'transmittal' of a claim. The State Department accordingly amplified its Suggestion, and the Court finally managed to hold that the mere fact of transmission of a protest in some way warranted it. This process was termed 'according finality' to the Executive's recognition of the claimant's facts.[2]

Sullivan's case was an action against two states of the United States of Brazil on bonds issued by them. The states and also the United States of Brazil appeared specially and pleaded immunity. Meanwhile, the Brazilian Ambassador wrote to the American State Department asserting the defendant's immunity from suit and also the interest of his Government in the funds. He enclosed copies of certain Brazilian decrees as evidence. A 'written suggestion' was accordingly filed on the request of the Secretary of State, embodying the representations of the Ambassador, but disavowing any intention to appear on behalf of Brazil, of the defendants, or of the United States, and not vouching for the claims. The District Court communicated with the State Department, who replied that it did not doubt the accuracy of the statements in the Ambassador's letter as to the status of the two Brazilian states, or as to the ownership of the funds. The letter to the Court continued:

> 'As to the question whether the States of Rio Grande do Sul and Sao Paulo are entitled to sovereign immunity, and the question whether immunity should be extended to the funds, it is the practice of the Department of State to leave such questions for determination by the Courts, applying the principles of international law to the facts and circumstances of the particular case.'

From this the Court deduced that the two states lacked external sovereignty. Subsequently, the State Department again wrote to the Court that, in its view, 'the interest of the Government of Brazil in the funds as explained in the Ambassador's letter . . . is of such a character as to entitle them to immunity from attachment by private litigants'. This last sentence is a departure from the 'neutrality' of Suggestions in the previous cases; the Department is already doing something more than act as a conduit pipe.

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[1] *Sullivan* v. *State of Sao Paulo*; *The same* v. *State of Rio Grande do Sul* (1941), 36 F. Supp. 503; 122 F. (2d) 255; *Annual Digest*, 1941–2, Case No. 50.

[2] See *Yale Law Journal*, 50 (1940), p. 1080.

The Court now had, however, first, to consider how far it was bound by the letter of the Brazilian Ambassador, in view of the acceptance of the facts set forth therein as true by the State Department, and, secondly, to construe those facts. It came to the conclusion that the State of Sao Paulo should be accorded sovereign immunity. This was affirmed on appeal by the Circuit Court of Appeals. The Court noted that the question at issue was, were the State Department and the District Attorney acting merely as 'automatic conduits' of the Brazilian Ambassador's claim, or did they also 'place upon it the stamp of indorsement of the Department'?

The Court answered its own question thus: that the Executive has chosen to transmit the claim is alone an implied recognition,[1] and in this case, when pressed, the Executive had done much more. It vouched for the accuracy of the statement of facts made by the Brazilian Ambassador, and declared for the immunity of the funds subject of the present litigation. This was clear recognition of the claim of the Brazilian Government to immunity so far as the Department was concerned, and the refusal to recognize the Brazilian claim 'as a conclusion of law' the Court terms 'hardly more than modest concern not to usurp the constitutional function of the Courts'. The Court would have none of this 'concern', and construed the communications from the State Department as acceptance of the Ambassador's claims.

On the question whether the conclusion of immunity by the Department had to be accepted as final, the Court examined Brazil's actual interest in the funds; observed that the facts as presented by the Ambassador established that the Brazilian States occupied in the Brazilian Union a status comparable to the North American States in the American Union; and found that they possessed sovereign immunity. But the Court felt that it required from the Department of State an assurance that the action, if proceeded with, would prejudice the relations between Brazil and the United States; and it managed to read as much into the State Department's letters, although their language was 'very guarded'. Moreover, the Court insisted that the very fact that the Department of State thought fit to transmit the protest at all was evidence that it regarded the issue as substantial, and from the language[2] of the Department's second letter deduced that it 'thought the issue important enough for the District Court not to proceed'.

It seems clear from this important but not very connected decision that the Court is reaching a stage where it is no longer accepting the bland disavowal of the Executive in matters of immunity. The State Department must lead and the Court will follow, the Court says in effect; and if the Department will not give a lead then the Court will find one somehow in the Department's own documents. A short time later, in *The Ioannis P. Goulandris*,[1] the Court again managed to induce the Secretary of State to vouch for the truth of statements he had intended merely to transmit; thereupon the Court allowed the plea of immunity. The course of events in this case bears a likeness to that in *Sullivan*'s case[2] but is more straightforward, apparently as though the Court had learnt what it wanted and how to get it. The *Ioannis P. Goulandris* was an action to recover for damage to cargo. The Greek Government moved to dismiss the action on the ground of sovereign immunity. The New York District Court denied the motion. The Greek Minister then wrote to the Secretary of State asking that the vessel, which was engaged on important business for the Kingdom of Greece, and urgently needed for war purposes, be delivered to him as agent of his Government. The State Department sent a certified copy of this communication to the Attorney-General for presentation to the Court, without argument or comment other than to state that the statements 'are brought to the attention of the Court as a matter of comity between the Government of the United States and the Government of Greece'. On receiving this the Court inquired of the State Department whether its action in transmitting the Greek Minister's note to the Court constituted an acceptance as true of the statements of fact contained therein. The Department replied that it was not in a position to pass on the accuracy of these statements, but that it felt that, coming from the representative of Greece in the United States, it was entitled to the respectful consideration of the Court. The Department had 'merely acted as a conduit', and its communication did not presume to be a recognition of the plea of immunity. At a later stage, however, a letter from the Department of State was submitted enclosing a copy of a further note from the Greek Government, after consideration of which, the Department declared, it accepted as true the statements of fact contained in the Greek Minister's original note. On hearing this the Court granted the motion to dismiss the libel on the ground of sovereign immunity.

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[1] The Court cited *Lamont* v. *Travelers Ins. Co.* (*supra*, p. 130) and *Hannes'* case (*supra*, p. 130), but it is not easy to see how the Court deduces this proposition from those cases.

[2] For an opinion that it is at least doubtful whether the language of the communications from the State Department required the Court to treat the defendants as sovereign see *Harvard Law Review*, 55 (1941–2), p. 150.

An interesting sidelight on the development shown in the two cases is, perhaps, thrown by consideration of the relevant dates of the respective judgments. In *Sullivan*'s case the Federal District Court (Eastern District) of New York gave its decision in January 1941, holding that it could relinquish jurisdiction when the facts as presented by the foreign sovereign are accepted as true by the Executive, even without passing upon the question of immunity. In August 1941 the Circuit Court of Appeals affirmed the judgment, holding that in transmitting the claim of immunity, and 'when pressed', the Executive performed more than an implied act of recognition. In *The Ioannis P. Goulandris* the District Court (Southern District, but the same judge, Moscowitz J.) on 20 June 1941 entered on the correspondence with the State Department which ended in September of that year with the Department 'accepting as true' the statements of fact contained in the Greek Minister's note about the status of the vessel under litigation; upon which the Court relinquished jurisdiction.

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[1] *The Ioannis P. Goulandris, American Tobacco Co. Inc. et Al.* v. *The Ioannis P. Goulandris et Al.* (1941), 38 F. Supp. 630; 40 F. Supp. 924; *Annual Digest*, 1941–2, Case No. 58.

[2] *Supra*, p. 133.

In the meantime, in March 1941, between these two cases, was heard the case of *Miller et Al.* v. *Ferrocarril del Pacifico de Nicaragua*[1] in which the Supreme Judicial Court of Maine discovered that by careful reading of the State Department's transmission of a claim for immunity it could show that the Department had actually recognized and allowed the claim. The action was one against a Maine Corporation and was dismissed in the lower courts as the Corporation was an 'instrumentality' of the Nicaraguan Government, despite the somewhat unusual feature that it was organized under the laws of the State of Maine. On appeal, objection was taken to the maintenance of the action both by the Nicaraguan Minister, who appeared as a friend of the Court and formally stated his country's objections, and on behalf of the State Department, after Nicaragua had made representations as to its position through the diplomatic channel. The plaintiffs contended that there was nothing in the case to show that Nicaragua's claim had ever been recognized and allowed by the Executive. 'We think otherwise', said the Court, and proceeded on a careful dissection of the documents in the case. At the request of Nicaragua the Secretary of State had, it appeared, sent the Attorney-General a communication stating (*inter alia*) that the Nicaraguan Legation makes the following statement:

> '. . . the defendant Corporation was and is, in fact, an instrumentality of the Government of Nicaragua, and has been so recognized by Your Excellency's Government in connection with [a] claim for refund of taxes and in [a] treaty,'

and instructing him to appear before the Court and to represent the position of the Nicaraguan Government as above set forth. But that position 'as above set forth', the Court now pointed out, was twofold: that the defendant was an 'instrumentality' of Nicaragua; and that the defendant had been so recognized. The incorporation by the Secretary of State of such a statement without comment must be taken as a tacit assent to its truth; and since the claim of immunity had already been recognized and allowed by the Executive branch of the Government, it would be the duty of the Court to grant the immunity prayed for.[2]

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[1] (1941), 137 Maine 251; 18 A (2d) 688; *Annual Digest and Reports*, 1941–2, Case No. 51.

[2] The Court also held that there was no need for the Attorney-General to suggest a dismissal;

Whether the later judgments of the New York Federal Court were influenced and their result suggested by this judgment of the Court of Maine must be a matter for speculation, but the fact remains that it is from this time that the Suggestions of the State Department normally use the phrase 'recognized and allowed' in respect of the claims of immunity brought to the notice of the Court, as though the Department has given way to the pressure of the judicature. Since the Court insists on treating transmission of a claim as recognition, the Department, it almost seems, might just as well 'recognize and allow' and have done with it.

'Judicial' versus 'political' questions. For all the apparent anxiety of the Court to induce the State Department to assume the responsibility of certifying matters of pure fact of an International Law nature, it continues to maintain a jealous regard for its own independence where the fact to be proved before it is of a judicial nature, e.g. a question of foreign law.[1] This careful distinction between 'political' and 'judicial' questions was well brought out in *Anderson* v. *N.V. Transandine, &c.*,[2] where the plaintiff obtained a warrant for attachment against certain property, which was alleged to belong to the Netherlands by virtue of a Royal Decree of 24 May 1940. The State Department certified to the Court that 'the Government of the United States continues to recognise as the government of the Kingdom of the Netherlands the Royal Netherlands Government, which is temporarily residing and exercising its functions in London'. In granting the motion to vacate the attachment, the New York State Court (New York County) said: 'The Statement of the [Netherlands Minister to the United States] that the "Decree is a valid and binding Act of the Royal Netherlands Government . . . and that . . . property . . . [and] . . . interests referred to therein are . . . vested in the State of the Netherlands . . ." is conclusive in our Courts as to the law of the Netherlands.'[3] This judgment was affirmed on appeal to the Appellate Division, without opinion, and again affirmed on appeal to the Court of Appeals. In the course of a long judgment the Court held:

> 'The certification by the State Department . . . constitutes a determination of political questions concerning the legitimacy of that government and its decrees. The scope and effect within this State of a decree promulgated by the recognised government are

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and that no question came before it for judicial determination, as the Executive branch of the Government, on the showing of the Attorney-General, had already acted in the matter.

[1] But not, it would seem, the status of a member state of a Federal State—cf. *Sullivan*'s case, *supra*, p. 133, which might have been thought a question of Brazilian law; or the status of a foreign Bank—cf. the *Ulen* case, *supra*, p. 132.

[2] *Anderson* v. *N.V. Transandine Handelmaatschappij et Al.* (*State of the Netherlands intervenor*) (1941), 28 N.Y.S. (2d) 547; (1942), 31 N.Y.S. (2d) 194; (263 App. Div. 705); 289 N.Y. 9; *Annual Digest and Reports*, 1941–2, Case No. 4.

[3] Cf. the English rule that the courts will accept as conclusive a declaration of the representative of a foreign sovereign as to the ownership of property claimed to be vested in the foreign state—see *The Jupiter* (No. 3), [1927] P. 122, 250.

judicial questions like those of any other state. The Certification was not intended to withdraw from the Court the jurisdiction or right to determine these questions, just as it would decide other judicial questions without advice or suggestion from the political branch of the Government.'

While this appeal was pending the Department of State had sent to the Chief Judge of the Court a letter saying that since the entry of the United States into the War, and the signing of the Declaration of the United Nations,[1] the Department had undertaken to formulate the policy of the United States with regard to the effectiveness of the Decree of 24 May 1940, and intended to ask the Attorney-General to make full representations to the Court setting forth that policy. This was done; a Suggestion was filed, setting out the interest and concern of the United States with regard to assets in the United States affected by the Decree. Annexed to the Suggestion was a letter from the Secretary of State enunciating the policy of the United States at length. At this, the Court seems to have suspected that the Department of State, by 'formulation' of its public policy as to the effect of the Decree, was attempting to change the judicial question determined by the Court below into a 'political question' which the courts would not then be empowered to decide. It hinted that 'the question whether the Courts must give effect to a mere *formulation* of policy by the State Department in respect to a foreign decree, regardless of whether such decree offends the public policy of the State' might involve 'very serious consequences'.

The Suggestion of the State Department as a 'recognition and allowance'. In the remainder of the cases noticed, which bring the present study down to very recent times, the formula used appears to have become settled: the Secretary of State 'accepts as true' the statements of the foreign Government, and 'recognizes and allows' the claim of immunity. With this formula the courts—Federal or State—seem to be content, so long as the State Department keeps to the right side of the line drawn between 'political' and 'judicial' questions. The Federal Court, for example, was quite content to accept and adopt the State Department's recognition of immunity so expressed in the case of *The S.S. Maliakos*,[2] a ship which had been requisitioned in London by the Greek Government, and was arrested on arrival in New York. The Greek Minister requested an order declaring that the *Maliakos* was the property of the Kingdom of Greece, and immune from suit. He filed with the Secretary of State a letter setting out the circumstances and validity of the requisitioning and the urgent need his Government had for the possession of the vessel. He submitted evidence in support, including proof of Greek law upon the subject, and requested the Secretary of State to 'make suggestion' to the Attorney-General that the United States Attorney file a Suggestion of immunity recognizing the contents of the appeal and its desire for the release of the vessel. In conformity with this request the United States Attorney, armed with copies of the Greek Minister's Notes, filed a suggestion of immunity, and stated that the State Department 'accepts as true the statement of fact' contained in the Notes. The Court expressed itself as satisfied in principle with the evidence thus produced. On the acceptance as true of the facts stated, it thought that the steamship was immune from attachment. ('To hold otherwise . . . would be an unwarranted aspersion upon the honour of a great state.')[1] However, the Court was induced by one of the parties to communicate with the Department of State to obtain a direct statement as to its present position; and received a letter[2] which made it clear that in affirming that the statements of fact contained in the Greek Minister's Notes were accepted as true, the Secretary of State had intended to convey 'the understanding that I recognized as warranted the claim of immunity'. On this the Court felt it its duty to do likewise. It protested, however, that 'under the decisions' it would feel amply justified in doing so from the Suggestion of immunity alone.

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[1] Declaration by United Nations, done at Washington, 1 January 1942, Treaty Series No. 5 (1942), Cmd. 6388.

[2] *The Maliakos. Irving Trust Co. et Al.* v. *The Maliakos*; *Ligett & Myers Tobacco Co. Inc.* v. *The Maliakos et Al.*; *American Tobacco Co. Inc.* v. *Same* (1941), 41 F. Supp. 697; *Annual Digest and Reports*, 1941–2, Case No. 217.

The Suggestion of the State Department as a 'conclusive determination'. It will be observed that in the most recent cases American courts have moved a step farther in the direction of subordinating themselves, in matters of immunity, to the Executive. In 1942, in *The Ucayali*,[3] the Court formally renounced its jurisdiction so far as it might conflict with the Executive's control of foreign affairs. In this case the respondent was 'a Peruvian corporation acting as agent on behalf of the Peruvian Government'. The Republic of Peru intervened and claimed sovereign immunity. The Peruvian Ambassador in Washington, 'following the accepted course of procedure', made representation to the State Department and sought recognition of the claim of immunity, asking for a Suggestion of immunity from suit to be filed. The Secretary of State in a letter certified that 'this Department accepts as true the statements of the Ambassador concerning the S.S. *Ucayali* and recognises and allows the claim of immunity'. The

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[1] The Court also cited *Berizzi Brothers Co.* v. *The Pesaro*, 271 U.S. 562; 461 S.Ct. 611; 70 L.Ed. 1088; *Annual Digest*, 1925–6, Case No. 135, where 'immunity was granted to [a ship] on the statement of the foreign representatives alone, without any intervention by our State Department'. The Court in its judgments in that case did not pause to consider the propriety of this. See *A.J.* 39 (1945), p. 588.

[2] Part of the letter is set out in *Annual Digest and Reports*, 1941–2, Case No. 56, at p. 220.

[3] *The Ucayali, Galban Lobo Co., S.A.* v. *Compania Peruana De Vapores y Dique Del Callao et Al., ex parte Republic of Peru* (1942), 47 F. Supp. 203; 318 U.S. 578; *Annual Digest and Reports*, 1941–2, Case No. 53.

United States Attorney then filed a statement and 'prayed that the claim of immunity be given full force and effect by this Court', a prayer which was not granted; the District Court decided that the plea must be overruled, holding that a sovereign which had entered, or which could be deemed from certain acts to have entered, a general appearance must be held to have waived its immunity from suit. But, on appeal, the Supreme Court held that 'the certification [that the Department of State had allowed the claim of immunity] and the request that the vessel be declared immune must be accepted by the Courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations'. The courts must not assume jurisdiction so as to embarrass the executive arm of the Government in conducting foreign affairs.[1]

In 1943 this tendency further showed itself in three cases: *Ex parte Republic of Peru*,[2] *Piascik*'s case,[3] and *The Janko*.[4] In the first of these the Supreme Court, showing scrupulous regard for the dignity of the foreign state involved, laid down the following principles: (1) The courts may not so exercise their jurisdiction by the seizure and detention of the property of a foreign sovereign as to embarrass the executive arm of the Government in conducting foreign relations; (2) a friendly foreign state may present its claim either to the Court or to the Department of State, the political arm of the Government charged with the conduct of foreign affairs; (3) in the latter case, upon recognition and allowance of the claim by the State Department and certification of its action presented to the Court by the Attorney-General, it is the Court's duty to surrender the seized vessel and remit to the libellant the relief obtainable through diplomatic negotiation. The Court declared that this practice was founded upon the policy, 'recognised both by the Department of States and the Courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsion of judicial proceedings'. In this case the Department had allowed the claim of immunity and caused its action to be certified to the District Court through the appropriate channels. The Court held that the certification and the request that the vessel be declared immune must be accepted by the courts as 'a conclusive determination by the political arm of the government that the continued retention of the vessel interferes with the proper conduct of our foreign relations', and that upon the submission of this certification to the Court it becomes the Court's duty, in accordance with established principles, to release the ship and to proceed no farther in the case. In other words, an approved Suggestion is binding on the courts even on points of law, and is conclusive not only of the question of sovereign status but of other questions of fact and law, such as ownership and possession. This is very strong doctrine, and categorical, such as may, it is conceived, amount to a denial of due process to the private litigants in cases where it is invoked.[1]

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[1] Forty years earlier the same Court had proclaimed that it 'does not . . . refuse to take action for fear that its decision may not be approved thereafter by the legislative or executive department': *In re Taylor* (1902), 118 Fed. 196.

[2] (1943), 318 U.S. 578.

[3] (1943), 54 F. Supp. 487.

[4] (1944), 54 F. Supp. 240.

In *Piascik* v. *British Ministry of War Transport*[2] the status of the defendant was in issue, and apparently was not thought to be as self-apparent as the title would lead to believe. The defendant appeared specially and pleaded sovereign immunity; the British Ambassador informed the Secretary of State that 'at material times the defendant was and is a department of the Government of the United Kingdom', and requested him to accept as true this statement of fact, and to cause to be communicated to the Court a statement that the Secretary of State recognized and allowed the claim of immunity of the defendant from suit. This was done, the Attorney-General presenting to the Court a copy of the British Note with the information that the Department of State recognizes the defendant as a duly constituted department of the British Government and therefore entitled to immunity from judicial procedure. He prayed the Court to grant relief. In complying with the prayer the Court said:

> 'Following *Ex Parte Republic of Peru*[3] . . . this Court is obligated to accept the decision of the Executive Government with respect to the status of the British Ambassador and the status of the defendant. Inasmuch as the Secretary of State has officially advised this Court that the defendant cannot be subjected to the jurisdiction of a Court of the United States, this Court is in duty bound to grant the Motion.'

Even more straightforward was the course of events in *The Janko*.[4] It was alleged that this vessel had been transferred to the Norwegian Government, who therefore appeared to plead immunity. The Suggestion of immunity was duly filed; and attached was a letter from the Secretary of State to the Attorney-General to the effect that 'the Department of State accepts the statements of fact contained in the Notes of the Norwegian Ambassador, and recognises and allows the claim presented to him on behalf of the King of Norway that the vessel is entitled to immunity from judicial process in the Courts of this Country'. The Court held that the Suggestion of immunity must be accepted 'for under its terms this Court is without jurisdiction to restrain the vessel'. The Department of State had said that it accepted as true the statements of fact contained in the Notes of the Norwegian Ambassador; it would follow that the Court is concluded by such acceptance of the facts. On the other hand, the Court pointed to a passage in one of the Notes referring to ownership of the vessel, and said that it was the Ambassador's own inference from certain communications between the Norwegian and Netherlands Governments: such inference was not necessarily to be accepted as a statement of fact.

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[1] It is not easy to reconcile the decision in *Ex parte Republic of Peru* with that in *The Anghyra* (*supra*, p. 129), decided only a short time earlier, in which the Court accepted evidence which contradicted a Suggestion of immunity of a ship.

[2] (1943), 54 F. Supp. 487.

[3] (1943), 318 U.S. 578; *supra*, p. 140.

[4] (1944), 54 F. Supp. 240.

Two cases of importance remain to be considered. The judgment in the first, *Mexico* v. *Hoffmann*,[1] is called by the learned Editor of Oppenheim's *International Law*[2] 'a somewhat drastic affirmation by the Supreme Court of the right of the executive department to determine the question of immunity'. In the second, *Mexico* v. *Schmuck*,[3] the Court seems to have attempted to recover some part at least of that right for itself.

Hoffmann's case was a libel against the *Baja California*, a vessel owned by the Mexican Government but under contract to a privately owned Mexican corporation in return for a share of the profits. The Mexican Ambassador to the United States filed a Suggestion that the vessel was owned by the Republic of Mexico and in its possession. In support, the United States Attorney filed a communication from the State Department calling the attention of the Court to the claim of the Mexican Government; but the Department 'took no position with respect to the asserted immunity of suit [*sic*]'[4] otherwise than to quote *Ervin* v. *Quintanilla*[5] and *The Navemar*.[6] The New York District Court denied the claim under the rule in *The Navemar*. The United States Attorney then filed a second Suggestion, that the *Baja California* was the property of the Mexican Government. But the District Court again denied the claim, finding the ship to be in 'the possession operation and control' of the private corporation. This was upheld by the Court of Appeals. However, the Supreme Court adopted a different view. It said: 'In the absence of the recognition of immunity by the political branch of the government, the Courts may decide whether all the requisites of immunity exist. In deciding whether the Courts should exercise or surrender jurisdiction, the Courts should not act so as to embarrass the Executive in its conduct of foreign affairs.' In the opinion of the Supreme Court the courts should neither deny immunity which the Government has seen fit to allow, nor allow immunity on new grounds which the Government has not seen fit to recognize. Since there was no case on record where the State Department had ever allowed a claim of immunity on the ground of ownership without possession, the Court concluded that it was national policy not to extend immunity, and thus it was the duty of the courts not to do so. After calling this judgment

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[1] *Republic of Mexico* v. *Hoffmann* (1945), 324 U.S. 30; and see *A.J.* 39 (1945), p. 585.

[2] Lauterpacht, vol. i (6th ed., 1947), p. 686.

[3] *Infra*, p. 143.

[4] 'The Mexican Ambassador claimed ownership. The Attorney General's suggestion . . . claimed nothing and suggested nothing': *Columbia Law Review*, 45 (1945), p. 80.

[5] *Supra*, p. 120.

[6] *Supra*, p. 123.

'a recession from *Berizzi Bros.*[1] in the light of 20 years development', Mr. Justice Frankfurter comments[2] that the courts should not disclaim jurisdiction which otherwise belongs to them except when the State Department explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby, he says, the responsibility for the conduct of American foreign affairs will be placed where the power lies. One is tempted to ask, in the light of the judgments just reviewed, how much power is likely to remain with the Judiciary, and for how long. However, in *Mexico* v. *Schmuck*[3] the Court does seem to have tried, at any rate, to call a halt to the succession of the self-imposed limitations of the political function. It is not by any means easy to ascertain the true *ratio decidendi* of the lengthy judgment of Lehman J., or to assess, at this short distance of time, its importance. Differences of wording between the letter from the State Department to the Court and the Suggestion filed by the Attorney-General, however, enabled the Court, in the end, to snatch at the 'limited jurisdiction' of ascertaining whether in fact there was evidence of a waiver of immunity in a certain contract made before it. In view of the complexity of the judgment, and the light it throws on the working of the judicial mind, it seems expedient to deal with the case here at some length. *Mexico* v. *Schmuck*[3] was an application for prohibition in respect of an action against Petroleos Mexicanos, described as 'an entity created under and by virtue of the laws of the Republic of Mexico', and hereinafter, for brevity, referred to as 'P.M.' The plaintiff in the substantive action had attached certain funds belonging to P.M. The United States of Mexico informed the Secretary of State that P.M. was 'an agent and instrumentality of the Mexican Government, created, organized and existing for the sovereign and governmental purposes of that government', that all its property and money in the U.S.A. belonged to the Mexican Government 'in the capacity of a sovereign'; and that the Mexican Government cannot 'with due regard to its national dignity, submit itself directly or through [P.M.] . . . to the jurisdiction of a friendly sovereign sister state'. A copy of the decree creating P.M. showed that it was organized as a public institution wholly owned and controlled by the Mexican Government for the purpose of operating the latter's property. The Secretary of State was requested to apprise the Court of the immunity of P.M. and its funds from suit and attachment. The plaintiff had denied that P.M. was an agent or institution of the Mexican Government, but asserted that it was an autonomous corporate body which under the law of its creation might sue and be sued; that the

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[1] *Berizzi Bros. Co.* v. *The Pesaro, supra*, p. 139, n. 1.

[2] In his concurring judgment: *A.J.* 39 (1945), at p. 592.

[3] *United States of Mexico et Al.* v. *Schmuck, Justice, et Al.* (1944), 293 N.Y. 264; (1945) 294 N.Y. 265. See also 267 App. Div. 167; 45 N.Y.S. (2d) 5; and *Associated Metals and Minerals Corporation* v. *Petroleos Mexicanos* (1943), 43 N.Y.S. (2d) 829.

Mexican Government was not a party to the action and not entitled to be heard on the motion or to claim immunity for P.M. The plaintiff also alleged a waiver of immunity in the contract out of which the action rose. In the action for prohibition the Attorney-General filed a 'Suggestion of Immunity with respect to [P.M.] and its property', and attached to the Suggestion a letter from the State Department with a copy of the Mexican Note. The Suggestion concluded thus:

> 'IV. By reason of the premises it has been *conclusively determined*[1] that [P.M.] is immune from suit and its property from attachment; and the claim of immunity having been recognised and allowed by the Executive Branch of the Government, and this suggestion of immunity having been filed, . . . it is the duty of this court to dismiss the action of [P.M.] for want of jurisdiction.'

The letter from the Secretary of State, however, stated that:

> 'The Department accepts as true the statements . . . that [P.M.] is a public agency [etc.]; . . . it has heretofore been recognised as such by this Government. Since it is well settled that a sovereign foreign state cannot be sued in the United States without its consent, the Department, in the absence of evidence of such consent in the present instance, recognizes and allows the claim of the Government of Mexico that [P.M.] is immune from suit and its property from attachment.'

The Court examined and contrasted the wording of the State Department's letter and that of the Attorney-General's Suggestion. In the letter it was pointed out that consent to be sued was needed, and that only 'in the absence of evidence of such consent' did the Department recognize P.M.'s claim of immunity. In the Suggestion, on the other hand, although the Court was informed that it was its duty to dismiss the action for want of jurisdiction, no express reference was made to the fact that the Department of State had recognized the claim of immunity only in the absence of consent on the part of the foreign state to be sued. In the trial of the substantive action, despite the Suggestion and the letter, certain questions as to the nature and character of P.M. and whether there had been a waiver of immunity, were referred to a referee, and the United States of Mexico were now, in effect, appealing against such reference. In granting prohibition except as to the question of waiver, the Supreme Court said:

> 'A mere suggestion of immunity, or assertion by a sovereign state that a defendant sued here is its agent . . . [or that property seized is its property], does not compel the Court to decline jurisdiction, or preclude judicial enquiry into the facts—even though the suggestion be presented to the Court by the Attorney-General upon the request of the Department of State. A suggestion so presented is only the allegation of a claim and "gives to the foreign government only the right to intervene and prove its allegation," unless the Department of State does more than present the Suggestion "for such consideration as the Court may deem necessary and proper".[2] The situation is different when the claim has been examined by "the political arm of the Government

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[1] My italics.

[2] Citing *Lamont* v. *Travelers Ins. Co.*, *supra*, p. 130.

charged with the conduct of our foreign affairs," and has been recognised and allowed by it.'[1]

The Court, relying on *Ex parte Republic of Peru* (*supra*), held that a judicial inquiry into the status of P.M. and its claim of immunity was precluded after the Executive's certification. It was immaterial that an inquiry into the juridical character of P.M. might have shown that it did not 'share sovereignty'; this 'ceased to be a judicial question when the Department of State had authoritatively recognized the claim of immunity'. The Attorney-General then filed a letter from the Secretary of State to him, stating that as the contract was not in the hands of the Department at the earlier stages it had not passed upon the question of whether the contract could be regarded as constituting consent to be sued and, if so, whether it operated to deprive Mexico of its rights of immunity. In reply to this, however, the Court pointed out that the political branch had always left to the judicial branch the determination of such questions as whether the Mexican Government or its agent had by the contract waived its immunity, and did not stay to consider whether the Department of State might, if it chose, require the Court to relinquish its jurisdiction. On the question of waiver by consent it was held that, in view of the terms of the letter from the Department of State, the Court was bound to adjudicate on the evidence. The Court then, however, took a further step down the slope of surrender. It conceded that 'judges who assume a jurisdiction which may embarrass the Department of State in the conduct of foreign relations' may be commanded [*sic*] to relinquish jurisdiction on the request or suggestion of the political branch of the Government, and they must not assume an 'antagonistic jurisdiction'. On the other hand, as though realizing where that line of argument might lead, the Court added that 'a party may not be refused access to the Courts for the determination of judicial questions except so far as the claim of the foreign sovereign has been recognised and allowed by the Department of State and the Court has been so advised'.

Once that proposition has been granted, the next is seen to be unexceptionable. 'In the absence of recognition of the claimed jurisdiction by the political branch of the government, the courts may determine whether all the requisites of immunity exist.' Finally, after quoting from its judgment in *Republic of Mexico* v. *Hoffmann*[2] as to the duty of the Court to avoid embarrassing the Executive, the Court, gathering itself together, managed to construe the communications from the Department of State as having intended to leave open for judicial determination whether the evidence showed that the United States of Mexico had consented, by waiver, to be sued. It concluded with the affirmation that 'The Court cannot be prohibited from exercising that limited jurisdiction'.

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[1] Citing *Ex parte Peru, supra*, p. 140.

[2] *Supra*, p. 142.

Conclusions. The foregoing survey of judicial decisions shows how the American courts have dealt with the problem of claims to immunity from their jurisdiction.[1] With regard to the method of asserting such claims, the practice has been that the foreign sovereign or his representative may appear before the Court as a suitor,[2] or, preferably, that the foreign sovereign may make representations as to the claim to the State Department, who will signify these to the court through the Law Officers.[3] With regard to the question as to who may assert the claim, it appears to be now settled law that a foreign Government, or minister, may file a Suggestion of immunity, which, however, will not have the 'force of proof'[4] or the status of a like Suggestion coming from the Executive. Thirdly, the courts have had to assess the effect of the assertion by the Executive of the claim of immunity. On this there seems to be no definite rule. All that can safely be said is that the courts have considered themselves bound by, and will accord great respect to, a Suggestion of the Executive recognizing and allowing a claim of immunity, so long as it is not concerned too obviously with questions of pure law.[5] While often seeking direction by such means,[6] they nevertheless attach importance to retaining the right to examine some of the factual evidence on which the claim is based.[7] In its communication to the courts the State Department, as in the Suggestion in *Mexico* v. *Schmuck*, goes much farther in directing the courts as to their duty than does the English Foreign Office. On the other hand, Executive and Judiciary seem to agree on the policy that questions of immunity arising in actions commenced by a private individual and involving the property of a friendly foreign Government should be adjusted rather through the diplomatic channel than by the compulsion of judicial process.[8] Like courts in other countries, the American courts are reluctant to pass on matters in which their decisions might embarrass the Executive. There has been a tendency among writers to approach this question as one of the independence of courts in relation to the Executive. Occasionally courts have shared in that tendency. However, it is possible that the matter need not necessarily be viewed as one of encroachment upon and abdication of the judicial function. The issue may be one of convenient apportionment of functions as between the Judiciary and the Executive. So long as the

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[1] Cf. the present author's article in this *Year Book*, 23 (1946), at p. 241.

[2] *The Navemar, supra*, p. 123.

[3] Ibid., p. 124.

[4] Ibid., p. 124.

[5] *Anderson* v. *N.V. Transandine, &c., supra*, p. 137.

[6] *The Ioannis P. Goulandris, supra*, p. 135.

[7] *Mexico* v. *Schmuck, supra*, p. 143.

[8] *Ex parte Republic of Peru, supra*, p. 140. Kuhn in *A.J.* 39 (1945), at p. 775, points out that if the plaintiff in such an action is not heard by the State Department when it is considering the plea of immunity, he is deprived of his rights without his 'day in Court'.

Executive, in its communications addressed to the Court on the subject of immunity, acts by reference not to shifting motives of policy but to considerations of legal principle, there is room for the view that questions of immunity are a technical legal matter of some complexity; that the relevant Department of the Executive which, with the help of an expert staff fully trained in this branch of the law, addresses the Court on this subject is particularly well equipped for answering the questions involved in accordance with international law; and that unless there is an assurance that courts will show sufficient familiarity with the rules of international law on the subject—as distinguished from vague reliance on 'international comity' —there is no reason to view the existing practice with undue apprehension.

IMMUNITIES OF THE SUBORDINATE DIPLOMATIC STAFF

By MISS JOYCE A. C. GUTTERIDGE

IN *Parkinson* v. *Potter*,[1] a case which was decided in the English courts sixty-two years ago, and in which diplomatic immunity was successfully claimed on behalf of one De Basto, who was described as an 'attaché' of the Portuguese Embassy and whose duties were to 'write letters and take messages and help in the translation of documents connected with the diplomatic work of the embassy', Matthew J. said:

> 'It appears from the authorities that the privilege of the embassy is recognised by the common law of England as forming a part of international law, and according to that law it is clear that *all persons associated in the performance of the duties of the embassy are privileged*, and that an attaché is within that privilege.'

The authorities referred to include Wheaton, Martens, Calvo, and Bluntschli, who were cited as showing a unanimity of opinion that jurisdictional immunity extended not only to the person of the diplomatic envoy himself, but to his family and suite, secretaries of the legation and other secretaries, and to his servants. At the present day, however, there is much divergence of opinion both in practice and amongst writers on international law as to the extent to which immunity from civil and criminal jurisdiction is enjoyed by subordinate members of the staffs of embassies and legations, and by the domestic servants of an ambassador or minister.

During recent years there has been a large increase in the number of subordinate officials forming part of the staff of an embassy or legation, and the duties performed by De Basto might now be shared amongst a number of minor clerical officials. It is probable that the increase in the number of minor officials forming part of the staff of an embassy or legation has led to the uncertainty which now exists as to how far such persons are entitled to claim diplomatic immunity and, in particular, whether they can be considered as enjoying exemption from local jurisdiction. Doubts have also been thrown, at any rate so far as immunity from criminal jurisdiction is concerned, on the doctrine that the domestic servants of an ambassador or minister are entitled to the same immunity as that enjoyed by the ambassador or minister himself. It has been argued that this privilege, based on the old conception of *franchise de quartier*, and the resulting duty of a head of a mission to punish his servants, is now obsolete.[2]

How far, then, does an examination of existing practice and theory allow the doctrine accepted by the English courts in 1885 still to be held? The question is of importance, for on the one hand the receiving state may reasonably be apprehensive of abuse of diplomatic privilege if jurisdictional immunity is enjoyed by a large number of subordinate officials and domestic servants, and, on the other hand, the possibility exists that the work of an embassy or legation may be hampered if minor officials or servants in the employment of the embassy or legation are to be called to account in the courts of the receiving state for any and every alleged breach of the laws, orders, and regulations in force therein.

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[1] (1885) 16 Q.B.D. 152.

[2] See, for example, *Journal of Comparative Legislation*, 3rd Series, vol. xxii, Part I, pp. 29–30, and *American Journal of International Law*, 26 (1932), pp. 119–20.

British practice in this matter may be summarized as follows: Members of an embassy or legation *down to its clerical staff* are entitled to diplomatic privilege, and are not subject to the jurisdiction of the civil or criminal courts. Menial servants at an embassy also enjoy a similar immunity, provided they are employed in the minister's or ambassador's household.

British practice is based on the Diplomatic Privileges Act of 1708.[1] Section 3 of the Diplomatic Privileges Act declares that

> 'all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any Ambassador, or other public minister of any foreign Power or State, authorised and received as such by Her Majesty, Her Heirs or Successors, or the domestic, or domestic servants of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions and purposes'.

The Act further provides that every servant must be registered in the office of one of the Principal Secretaries, i.e., the Foreign Office. The practice is to furnish the Foreign Office with a list of those persons on whose behalf immunity may be claimed and to include on this list members of the clerical staff, provided that they are not British subjects, and domestic servants of the head of the mission, whatever their nationality.

The English courts came, during the eighteenth century, to give a very generous interpretation to the expression 'domestic or domestic servant', provided that the employment was bona fide. In *Toms* v. *Hammond*,[2] which was decided twenty-five years after the Diplomatic Privileges Act came into force, the defendant's claim to immunity as 'the domestic or menial servant' of the Duke of Mecklenberg's Envoy failed, and it was held that 'a person hired as a clerk is no domestic servant'. This restrictive interpretation was, however, rejected by the English courts in two cases decided later in the eighteenth century. In *Triquet* v. *Bath*[3] the English secretary of a foreign ambassador was held to be within section 3 of the Act, and in *Hopkins* v. *Roebuck*[4] a Swedish subject employed as a secretary or amanuensis at the Swedish Embassy was similarly held to be entitled to immunity. Attempts to claim immunity where no bona fide employment existed appear to have been frequent, but were without exception rejected by the English courts.[1] Further, the English courts, by the decision in *Novello* v. *Toogood*,[2] prevented too wide an interpretation of the doctrine of immunity by holding that immunity did not exist, in the case of a 'servant', where the transaction in respect of which the action was brought was unconnected with the services of the plaintiff. From this decision it is reasonable to infer that in the case of 'servants' the immunities enjoyed under the Act of 1708 are limited to transactions arising out of and in the course of service. The Act of 1708 was clearly never intended to apply to criminal proceedings 'for immunity from the criminal jurisdiction involves somewhat different theories and applications' from those which relate to civil actions.[3] In other words, whether criminal proceedings shall be brought has always been a matter for decision by the executive power.

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[1] 7 Anne, c. 12. For a detailed examination of that practice see Mervyn Jones in *Journal of Comparative Legislation*, 3rd Series, vol. xxii, pp. 19–31.

[2] (1733), Barnes 370.

[3] (1764), 3 Burr. 1478.

[4] (1789), 3 T.R. 79.

There are no English judicial decisions respecting the immunity of minor officials or servants from criminal proceedings. There exists, however, the Opinion of the Law Officers of the Crown in connexion with the case of Gallatin, who was coachman to the United States Ambassador and who in 1827 was arrested on embassy premises and tried, in the English courts, for assault. The Law Officers stated that 'neither that law [i.e. the Act of 1708] nor any construction that can properly be put upon that Statute, extends to protect the mere servants of Ambassadors from arrest on criminal charges',[4] and the Foreign Office, although admitting that the circumstances of the arrest were objectionable, claimed that the trial was lawful. At the present day, however, British practice in this matter is in advance of that which obtained in the early nineteenth century, and minor officials and servants whose names appear on the diplomatic list are not prosecuted except after consultation with the head of the mission and, presumably, with his consent. Instances of British practice in the present century are afforded by two cases in which the chauffeurs of the heads of foreign missions were involved. In 1906 the United States Ambassador in London claimed immunity for his chauffeur who was being prosecuted at Barnet Petty Sessions for dangerous driving, and the case was dropped.[5] Again, in 1938 when the chauffeur to the Netherlands Minister was charged with driving a car while under the influence of drink, it was objected that the court had no jurisdiction, and the case was adjourned.[6]

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[1] Jurisdictional immunity was, for instance, unsuccessfully claimed on behalf of the English Chaplain to the Ambassador from Morocco who was a Mohammedan: Moore, *A Digest of International Law*, vol. iv, p. 655.

[2] (1823), 1 B. & C. 554.

[3] *American Journal of International Law*, 26 (1932), p. 99.

[4] Moore, op. cit., vol. iv, p. 657.

[5] *Law Times*, 121 (1906), pp. 319–20.

[6] *South London Press*, 22 April 1938.

The practice of the United States of America regarding the jurisdictional immunity of subordinate officials and servants follows British practice very closely. The statutory law of the United States has given partial recognition to a principle which is to be found in certain continental systems of law and which British practice adopts in the case of minor officials though not in the case of servants, namely, that jurisdictional immunity shall not extend to nationals of the receiving state. Further, the American courts have expressly recognized, in a case in which a cook at an embassy was concerned,[1] the immunity from *criminal* jurisdiction of domestic servants, and the decision in this case amplifies a statement by Secretary Hull,[2] made public on 6 December 1935, in which he declared: 'The immunity of duly accredited foreign diplomatic representatives and their staffs from arrest, detention or molestation of any sort is a practice the necessity of which has for many centuries been universally recognised by civilised nations.'

The Act of Congress of 1790 follows very closely the wording of the English Diplomatic Privileges Act of 1708.[3] It provides that any process shall be rendered void whereby 'the person of any public minister, or of any foreign prince or State, authorised and received as such by the President, or any domestic or domestic servant of such minister is arrested or imprisoned, or his goods or chattels are distrained, seized or attached', and it subjects to severe penalties anyone who sues out or executes such process. It is further provided[4] that immunity can only be claimed, in the case of a domestic servant, where the name of the servant has been registered in the Department of State, and transmitted by the Secretary of State to the Marshal of the District of Columbia.

The statutory law of the United States further provides that there shall not be immunity in any case in which the person against whom the process is issued is a citizen or inhabitant of the United States, and the process is founded upon a debt contracted before he entered the service of the diplomatic envoy.[5] It is natural that British practice and that of the United States should be in close conformity, but agreement concerning a legal principle between the two common law countries does not, of course, mean that such a principle is part of the generally accepted Law of Nations. It is necessary, therefore, to examine as fully as possible the practice of other countries.

The most complete recognition afforded by continental doctrine to the principle of the jurisdictional immunity of subordinate officials and servants is to be found in the German law of the pre-Nazi period. Sections 18 and

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[1] *U.S.* v. *Lafontaine* (1831), Fed. Cas. No. 15,550.

[2] Hyde, *International Law*, vol. ii, 435, pp. 1267–8.

[3] Rev. Stats. s. 4063.

[4] Ibid. s. 4065.

[5] Ibid. s. 4064.

19 of the Law on the Constitution of Courts (*Gerichtverfassungsgesetz*) divides *Geschäftspersonal* into three categories:

(1) Heads and members of the mission.
(2) Office staff.
(3) Employees of (1), i.e. domestic servants.

It provides that persons coming within any of these three categories enjoy exemption from German jurisdiction provided they are not German nationals.[1] That the existing German law was put into practice is shown by a case in 1899 in which a French servant in the employ of the Spanish Ambassador in Berlin was charged with assault and in which it was held that his claim to immunity must be allowed.[2] Austrian law followed the German law very closely. In respect of criminal matters it was provided in 1873[3] that 'the foreign ministers accredited to the Austro-Hungarian Court and the actual staff of their legations are not subject to the Austro-Hungarian judicial authorities. The household and domestic servants of the Ministers who are not at the same time subjects of the state to which the Minister belongs are not subject to the Austrian Courts.' A similar immunity from civil jurisdiction was accorded in 1895.[4] Hungary accorded jurisdictional immunity to the following classes, as well as to the heads and members of missions, including their families: members of the Chancery personnel (e.g. secretary, archivist, director of chancery, stenographer); *huissiers* of the mission, and service personnel, provided they were nationals of the sending state.[5] Germany, Austria, and Hungary, therefore, have given very full recognition to the jurisdictional immunity of 'all persons associated in the performance of the duties of the Embassy', save that Germany and Austria exempted from the enjoyment of such immunity German and Austrian nationals, and Hungary stipulated that the persons enjoying immunity must be nationals of the sending state.

Switzerland accords immunity to heads and members of missions and their families, and to the head of the secretarial staff, and to household servants of the head of a mission, where such persons are not of Swiss nationality.[6] Information supplied by the Swiss Government to the British Foreign Office shortly before the recent war emphasizes the point that the subordinate Chancery personnel of a legation (other than the head of the secretarial staff) are not, according to Swiss law, exempt from the jurisdiction of the local courts.

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[1] See also the Law of Judicial Organization of 24 January 1877 (version of 22 March 1924, printed in Feller and Hudson, *Diplomatic and Consular Laws and Regulations*, vol. i, p. 563) which provides for the jurisdictional immunity of chiefs and members of missions accredited to the German State, and of members of their families and their business personnel, and of such of their domestics as are not German nationals.

[2] Moore, op. cit., vol. iv, p. 662.

[3] Criminal Procedure Order of 23 May 1873: Feller and Hudson, op. cit., vol. i, p. 51.

[4] Introductory Law to Jurisdiktionsnorm of 1 August 1895: Feller and Hudson, op. cit., vol. i, p. 52.

[5] Memorandum of the Hungarian Minister of Foreign Affairs to the American Minister, transmitted to the Secretary of State, 4 March 1930: *Archives*, Department of State.

[6] League of Nations, C. 196, M. 70, 1927 V, p. 247.

The French courts have, in practice, accorded immunity from both criminal and civil jurisdiction to members of missions and their families, but in other respects have been conservative in the matter of granting immunities, as is shown by a judgment of the French Cour de Cassation, dated 26 February 1937, which declares that personal immunity is confined to the ambassador or minister and to those of his subordinates who form an integral part of the legation and are invested with a public character.[1]

Italian practice is rather less conservative than that of France. In the nineteenth century the Italian courts were not prepared to concede immunity from criminal jurisdiction to the servants of foreign diplomats, as is shown by two cases in 1881 and 1894, in which the Italian courts exercised jurisdiction over the coachmen of foreign diplomats.[2] During the present century, however, Italian courts have been prepared to concede immunity from criminal jurisdiction to the domestic servants of diplomats, as is shown in a case, decided on 25 March 1938, by the Court of First Instance of Rome,[3] in which the Court declined jurisdiction over a domestic servant, who was not an Italian national, of the Second Secretary of the Swiss Legation to the Holy See, and who was accused of infanticide committed in Italy. The Court declined jurisdiction on the ground that the immunities and prerogatives accorded to diplomatic agents must, by customary international law, be extended to their servants, provided such servants are not nationals of the receiving state. A recent statement of the position supplied by the Italian Minister of Foreign Affairs in 1930[4] was to the effect that jurisdictional immunity extended to members of missions and their families, administrative personnel (but not their families), and to domestic servants not of Italian nationality.

Whilst Italy's recognition of the jurisdictional immunity of the servants of a diplomatic envoy has been a recent development, and it would appear that France is still unprepared to concede such immunity to servants, Denmark has for long given at least partial recognition to the doctrine. In the same year—1708—in which the English Parliament passed the Diplomatic Privileges Act, there was a Danish enactment providing that 'foreign ministers accredited to the Court of the King, their families, servants and property, cannot be called before the Courts or arrested for debt incurred during their stay or their departure'.[5] Thirty-three years later the Danish

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[1] S. 1938, i. 117.

[2] Moore, op. cit., vol. iv, p. 662.

[3] *In re Reinhardt*, *Annual Digest of International Law Cases*, 1938–40, Case No. 171.

[4] Memorandum of the Italian Minister of Foreign Affairs to the American Ambassador transmitted to the Secretary of State, 16 October 1930: *Archives*, Department of State.

[5] Enactment of 8 October 1708: Feller and Hudson, op. cit., vol. i, p. 409.

Government recognized, in an instruction to the Chief of Police in Copenhagen, the immunity from criminal jurisdiction of the 'employees of foreign ministers' who had been causing disturbances in the streets of Copenhagen, by providing that such unruly employees should only be detained temporarily, and that 'their masters shall be informed immediately of what has happened so that the latter may send for them and at their discretion administer justice to them'.[1] Nearly two hundred years later an instance occurred which showed that Danish practice still maintained the same view of the jurisdictional immunity of the servants of diplomatic envoys, even though the head of a mission would no longer be considered to be under a duty to punish his servants. In 1930 the chauffeur of the United States Minister to Denmark was alleged to have committed an assault. He was set free against a guarantee from the United States Legation during the police court proceedings, and the case against him does not appear to have been pursued before the Danish courts.[2]

Danish practice, which clearly indicates the view taken in Denmark regarding the immunity of servants from civilian jurisdiction, is silent on the position with regard to the subordinate officials of an embassy or legation, and particular interest, therefore, attaches to a reply given, shortly before the Second World War, to the British Foreign Office by another country of northern Europe. This was from the Estonian Government, and was to the effect that the Estonian Ministry of Foreign Affairs divided personnel other than heads and members of missions into 'Official Personnel' and 'Domestic Servants'. The weight of opinion in favour of the exemption of the *former* from criminal jurisdiction was described as 'overwhelming'.

The jurisdictional immunity of minor officials and servants has been recognized outside the continent of Europe. In Japan the Japanese Supreme Court recognized the immunity from criminal jurisdiction of subordinate official personnel, whilst their employment still continued. Two attendants, formerly employed at the Chinese Legation, were charged with the breach of a decree concerning explosives. Their employment with the legation had terminated before proceedings were begun in the District Court. On appeal it was held that their conviction must stand on the ground that *while they could not be tried in the territorial courts during the tenure of their office as employees*, they could be tried when they became divested of it.[3]

On the other hand, the practice of South American countries shows considerable divergence and a tendency in certain quarters to be restrictive.

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[1] Feller and Hudson, op. cit., vol. i, p. 410.
[2] *In re Kennet and Nichols*: *Annual Digest*, 1929–30, p. 304.
[3] *The Empire* v. *Chang and Others*: ibid., Case No. 205.

Colombia[1] recognizes the immunity of 'diplomatic agents, any of the persons who belong to their families, official suites, or their personal servants'. In Argentina the domestic servant of the British Ambassador, who was the defendant in a civil action for damage for personal injuries, was recognized as being privileged,[2] but the Argentine Supreme Court refused to recognize the claim to immunity of the Commercial Attaché to the Paraguayan Legation, who was involved in criminal proceedings in respect of personal injuries inflicted on another party in a collision.[3] A Chilean Court held that the secretary of a legation could be prosecuted for fraud.[4] It should, however, be noted that this latter decision has been considered as being at variance with the weight of judicial and technical opinion in Latin America.

It has now been seen that there is a widespread recognition of the jurisdictional immunity of servants and minor officials, but it must be conceded that such recognition is not universal, and that in certain countries, although the immunity of servants from criminal jurisdiction has been recognized, the position of minor officials in respect of criminal proceedings, and of both minor officials and domestic servants in respect of civil proceedings, is far from well defined. An instance of a state which was not prepared to concede, in principle, jurisdictional immunity in either civil or criminal matters is furnished by a communication from the Greek Government to the British Foreign Office in 1932, in which it was stated that the staffs of legations were technically liable to arrest or to appear before the Greek courts, although it was added that, in practice, no member of a legation staff would be arrested without the consent of the minister, unless he was taken *flagrante delicto*.

It is not, therefore, altogether surprising to find that modern Russian law excludes from jurisdictional immunity minor officials and servants. Article 1 of the Penal Code of the U.S.S.R. of 31 October 1921[5] provides that 'All persons within the territory of the U.S.S.R. are subject to the penal laws of the country with the exception of those foreigners who enjoy the right of extraterritoriality'. The persons who enjoy this right are specified in the Regulations concerning Diplomatic Missions and Consular Institutions of Foreign States in the Territory of the U.S.S.R. as follows:[6]

> 'Diplomatic representatives and members of diplomatic missions of foreign States, (i.e. Counsellors including Commercial Counsellors), first, second and third secretaries and attachés (including commercial, financial, military and naval attachés).'

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[1] Código Judicial 295.

[2] *In re Kosakiewick*, *Annual Digest*, 1941–2, Case No. 114.

[3] *In re Alberto Grillon, Hijo*, ibid., 1929–30, Case No. 194.

[4] *Pacey* v. *Barroso*, ibid., 1927–8, Case No. 250.

[5] Feller and Hudson, op. cit., vol. ii, p. 1217.

[6] Ibid., p. 1218.

The Regulations go on to say that such persons as enjoy the right of extraterritoriality 'are not subject to the jurisdiction of the judicial institutions of the U.S.S.R. and of the Federated Republics in criminal matters, unless there be consent of the Governments of the respective foreign States and are subject to the jurisdiction . . . in civil matters only within the limits fixed by the rules of international law or by agreement with the respective States', and make it quite clear that such jurisdictional immunity will be accorded to no other persons.

What, then, are the results of this brief survey of existing practice? At one end of the scale is the clear-cut recognition afforded by German and Austrian law to the principle that minor officials and servants enjoy full jurisdictional immunity, both in civil and criminal matters, unless they are nationals of the receiving state. The practice of both the United Kingdom and the United States of America is to afford to both minor officials and servants who are on the diplomatic list full immunity in respect of civil proceedings. In the United Kingdom criminal proceedings will not be instituted against such personnel except after consultation with the head of the mission, and the United States has given recognition in its courts to the immunity of servants from criminal jurisdiction. Italy and France are conservative as regards immunities and are both influenced by conceptions of 'public law' which are foreign to English lawyers. The U.S.S.R. is adamant in taking a most restricted view of jurisdictional immunity, and in excluding therefrom both minor officials and servants.

Reluctantly we are driven to the opinion that on this matter the Law of Nations speaks with many tongues, and if we seek guidance from the writers and authorities on international law we are still without a clear light on our path. Rivier[1] concedes complete immunity to servants, which may be renounced by their masters. Oppenheim[2] takes the view that 'it is a customary rule of international law that the receiving State must grant to all persons in the private service of the Envoy, whether such persons are subjects of the receiving State or not, exemption from civil and criminal jurisdiction'. Hall[3] states that in practice the immunity of servants and of other persons whose connexion with the minister is comparatively remote is very incomplete. Fauchille[4] takes the view that international law confers no immunity on servants whatever, whether in civil or criminal matters. Pradier-Fodéré[5] concedes immunity to 'unofficial personnel' provided they are resident at the embassy. The Resolutions of the Institute of International Law in 1895[6] conceded complete immunity to 'unofficial personnel' if of foreign nationality, but otherwise only gave immunity to such personnel if they were actually on the premises of the mission. The Pan-American Convention of 20 February 1928,[1] concerning Diplomatic Officers, makes no mention of servants, and in stating (Article 19) merely that 'diplomatic officers' are exempt from all criminal and civil jurisdiction of the state to which they are accredited, implies that clerical officials, for example, would not be entitled to claim immunity.

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[1] *Principes du droit des gens*, vol. i (1896), p. 459.

[2] Oppenheim, *International Law*, vol. i (6th ed. by Lauterpacht, 1947), p. 725.

[3] Hall, *International Law* (8th ed., 1924), p. 229.

[4] *Traité de droit international public*, vol. i (1926), Part III, p. 94.

[5] *Cours de droit diplomatique*, vol. ii (1881), p. 218.

[6] *Annuaire*, vol. xii, p. 204.

It is submitted that the principles which can afford guidance in this matter are to be found in the Comment of the Harvard Research Institute on Article 23 of the Draft Convention on Diplomatic Privileges and Immunities prepared by the Institute,[2] and in Sections 20 and 21 of the General Convention on the Privileges and Immunities of the United Nations.[3] Article 23 of the Draft Convention is as follows:

> 'Subject to the provisions of this Convention, a receiving State may exercise jurisdiction over any member of the administrative or service personnel of a mission, only to an extent and in such a manner as to avoid undue interference with the conduct of the business of the mission.'

The Comment of the Harvard Research Institute on this Article is that it emphasizes the duty of the receiving state towards the sending state not to interfere with the proper functioning of the latter's mission. 'This duty being recognised, it does not seem necessary to surround the administrative and service personnel with those privileges and immunities known as diplomatic.' It is further emphasized in the Comment on Article 23 that Article 18 of the Draft Convention provides that so far as administrative personnel are concerned, there is non-liability for acts done by them within the scope of their official functions. The Comment proceeds to point out that service personnel, i.e. 'servants' in the strict sense, are afforded no immunity from jurisdiction by the Draft Convention. They cannot be subject to the jurisdiction of the receiving state while upon the premises of a mission or of a member of a mission (Art. 3), but they, like the administrative personnel, may be subjected to the jurisdiction of the receiving state for offences committed upon such premises if the arrest occurs elsewhere. They may also be sued in contract or tort, but process must not be served upon the premises of a mission or a member of a mission. '*The limitation is that the receiving State shall not exercise its jurisdiction so as unduly to interfere with the business of the Mission.*'

It is admitted by the commentators that that Article is *lex ferenda*, not strictly declaratory of international law, but an attempted and approximate recognition of modern international practice.

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[1] Satow, *Guide to Diplomatic Practice* (3rd ed.), pp. 170, 182.

[2] *American Journal of International Law*, 26 (1932), pp. 118–21.

[3] Cmd. 6753.

> 'The exercise of so wide a variation of State practice . . . demonstrates that there is no irreducible minimum of privileges and immunities which every state feels itself obligated by international law to extend to members of the non-official personnel of a diplomatic mission. The fact that some States have deemed any privileges extending to servants . . . together with the fact that in the case of some governments diplomatic immunities for non-official personnel are demanded and granted as the result of an *opinio necessitas*, leads to the conclusion that there is no universal rule of law upon the subject, and that there are recognised to exist, in some countries, customary usages which derogate from the general practice.'

As the result of these considerations, the commentators conclude by saying: 'It appears, therefore, that the present article would violate no existing rule of customary international law, and that it provides a convenient and adequate minimum standard of treatment for members of the administrative and service personnel.'

Section 20 of the General Convention on the Privileges and Immunities of the United Nations also emphasizes the principle that the Harvard Research Institute had in mind, namely, that immunities are granted, not for the personal benefit of the individual, but in order that the work of a mission shall not be impeded. This section states that

> 'Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.'

It is submitted, therefore, that the basis of all immunities, especially jurisdictional immunity, is that they exist not for the personal benefit or convenience of the individual, but in the interests of the mission of which such individual forms part. The purpose of jurisdictional immunity is to avoid undue interference with the conduct of the business of a mission. If these premises are accepted, it is possible to draw a distinction between the head of a mission and the diplomatic staff of a mission, whose immunity from both civil and criminal jurisdiction is a universally recognized principle of international law, and the clerical and 'service' staff of a mission to whom such immunity is not always conceded.

It is suggested, therefore, that the following principles can, and should be, generally accepted and that they should be recognized as forming a part of international law:

(i) The receiving state shall have no claim to exercise jurisdiction over a minor official or servant for any act done by him in the performance of his duty in the service of the mission.

(ii) As regards all other cases, the receiving state shall exercise jurisdiction over minor officials and servants only in cases in which to do so

> will not constitute undue interference with the conduct of the business of the mission.

It is submitted that it is only in such circumstances that the head of a mission should have, under international law, a right to claim immunity for his subordinate officials and for his servants, and that he is under a duty to waive jurisdictional immunity in all cases in which to insist on it would impede the course of justice, and where it can be waived without prejudice to the interests of the mission.

PRIZE LAW DURING THE SECOND WORLD WAR[1]

By S. W. D. ROWSON, LL.B.

I. *Introduction*

1. *The task of the Prize Court.* In the first prize law case of the First World War Sir Samuel Evans gave expression to his determination to follow the 'splendid examples' and uphold the 'great traditions' of his predecessors in the English Prize Court.[2] In the first prize law case of the Second World War Lord Merriman, after paying tribute to the way in which his predecessors had maintained those traditions, observed that they had marked the path so well that his task would be rather that of the pedestrian than of the pioneer.[3] This difference in the evaluation of their respective tasks, true though it is, must not make us forget that the judges of the Second World War, in every country, were faced with very real problems for which there were not always precedents at hand. Although in nearly every country new legislation governing prize law was issued in connexion with the Second World War, this legislation follows traditional lines. It does nothing to sever the historic tie between present-day prize law and the past.[4] On the contrary, the new prize codes implicitly strengthen this tie.

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[1] The following abbreviations are used in this article: *Annual Digest—Annual Digest of Public International Law Cases*; *A.J.—American Journal of International Law*; *B. & C.P.C.—British and Colonial Prize Cases*, 3 vols. (1915–22); *B.I.N.—Bulletin of International News*, 1924–45; *Boll.—Bollettino del Tribunale delle Prede*, 4 vols. (1941–2); *B.Y.—British Year Book of International Law*; Colombos—*A Treatise on the Law of Prize* (2nd ed., 1940); *E.P.C.—English Prize Cases*, 2 vols. (1905); Garner—*Prize Law during the World War* (1927); *G.U.—Gazzetta Ufficiale* (Italy); Hackworth—*Digest of International Law*, 8 vols. (1940–4); Hague Air Rules—*Rules contained in the General Report of the Commission of Jurists to consider and report upon the revision of the rules of air warfare* (1922), *Parl. Papers*, Misc. No. 14 [1924] Cmd. 2201; *J.O.—Journal Officiel* (France); *Jurisprudence Allemande*—Fauchille and De Visscher, *Jurisprudence Allemande en matière de Prises Maritimes* (1924); *Jurisprudence Française*—Fauchille, *Jurisprudence Française en matière de Prises Maritimes* (1916–19); *Jurisprudence Italienne*—Fauchille and Basdevant, *Jurisprudence Italienne en matière de Prises Maritimes* (1921); *L.Q.R.—Law Quarterly Review*; *Ll.P.C.* (2nd)—*Lloyd's Prize Cases*, 2nd series; *RGB.—Reichsgesetzblatt* (Germany); *S.R. & O.—Statutory Rules and Orders*; *Staatsblad—Staatsblad van het Koninkrijk der Nederlanden* (Holland); Verzijl—*Le Droit des Prises de la grande guerre* (1924).

[2] *The Chile* (1914), 1 *B. & C.P.C.* 1, at p. 11.

[3] *The Pomona* (1939), *Ll.P.C.* (2nd) 1, at p. 4.

[4] The principal prize legislation in force during the Second World War is as follows: Germany: *Prisenordnung* of 28 August 1939, *RGB.* (1939), i. 1585, amended by Ordinances of 12 and 14 September 1939, ibid. i. 1751, 1752, and Law of 19 December 1940, ibid. (1940) i. 1629 (herein cited as *Prisenordnung*); Italy: Laws of War of 8 July 1938, *G.U.*, Supplement, 15 September 1938, No. 211, amended by Law of 16 December 1940, ibid., 30 January 1941, No. 24, by Royal Decree Law of 6 March 1941, ibid., 18 April 1941, No. 93, re-enacted as Law of 4 July 1941, ibid., 2 September 1941, No. 206, and Law of 29 November 1941, ibid., 4 February 1942, No. 28 (herein cited as Laws of War); Holland: *Prijsreglement* of 3 June 1940, *Staatsblad* No. A. 2, amended by Decrees of 10 July 1941, ibid., No. B. 58, and 7 January 1942, ibid., No. C. 1 (herein cited as *Prijsreglement*); France: Instructions sur l'application du droit international en cas de guerre of 8 March 1934, *Bulletin Officiel de la Marine* (1934), No. 14, p. 157 (herein cited as *Instructions*); Turkey: Prize Law of 17 July 1940, Law No. 3894, *Official Gazette*, 18 July 1941 (a

Drafted in the light of the decisions of the national and foreign courts during the First World War, they often expressly incorporate previous doctrines and interpretations which have secured general approval. This process has led to considerable uniformity, most noticeable in what is the heart of modern prize law, namely, the determination of enemy character and the law of contraband, as well as in many peripheral matters of substance. It is less evident on the procedural side. Accordingly, despite the more intense nature of modern totalitarian war, which has effectively blurred so many of the traditional features of the law of war, the function of the prize court has remained essentially unchanged. Its business is still to decide the basic question of prize or no prize by the application of the well-established criteria and doctrines. It is true that modern commercial warfare at sea, as waged by Great Britain, seeks to prevent confiscable cargoes from ever setting sail, and, as waged by Germany, tries to destroy them before they reach their destination. But this only affects the volume of the work which the prize court is called upon to do, not the nature of its work. The problem before the courts in 1939 was not, as it had been in 1914, to apply to the changed conditions of modern warfare and modern commercial practice principles laid down some hundred years earlier. It was rather to continue the process, initiated in the new codes, of underlining the sound principles established twenty-five years before and rejecting those which have been found to be unsound and based on false reasoning. If, in consequence, the prize judges have had less scope for ingenuity and creativeness, they have compensated for it by greater awareness of their true role in deciding the fundamental question of prize or no prize, and of the factors to be kept in mind in reaching their answer. In the continuity of that tradition there is clearly noticeable the profound influence which British prize law has had on the whole development of modern prize law. No doubt this is largely due to the fact that Great Britain, as the principal naval power in two World Wars, has demanded and enforced the maximum extent of belligerent rights at sea, and so compelled the other belligerents to aim at similar effects. On the other hand, it is equally certain that the judgments of the British prize courts have emerged from the criticisms of reputable jurists with enhanced prestige. This influence is

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translation of the *Prisenordnung*); Norway: Provisional Order in Council relating to Prize Regulations of 22 April 1940, made permanent by Lov om prisereglar og prisedomstolar of 2 May 1947, in *Norsk Lovtidend* (1947), 274 (herein referred to as *Prize Law 1947*). On the other hand, the principal naval belligerents were content merely to issue amendments to their existing legislation, the amendments being both of a substantive and of a procedural nature. See Great Britain, Prize Act, 1939, 2 & 3 Geo. 6, c. 65, Prize Salvage Act, 1944, 7 & 8 Geo. 6, c. 7; United States of America, Act of 24 June 1941, 55 Stat. 261, Act of 18 August 1942, 56 Stat. 746, Act of 1 July 1944, 58 Stat. 678, Act of 14 November 1945, 59 Stat. 581; Japan, Navy Ordinance modifying Ordinance No. 8 of 1914 respecting the rules of sea warfare, communicated to the Swiss legation in Tokyo on 20 March 1942.

well expressed in the extensive reliance placed upon British decided cases in both the pleadings and the judgments of foreign courts.

II. *Prize Courts and the law applicable by them*

2. *Prize proceedings as a municipal matter.* It is axiomatic that prize courts are municipal tribunals. This is so although they derive their true authority from international law. Because they are municipal tribunals there are substantial differences between them; international law has played a small part in the development of their structure, organization, competence, and procedure.[1] Nevertheless, in the new codes of prize procedure there are sporadic instances of conditions in other countries being taken into account or of criticism being met. Thus, the harsh British doctrine concerning the right of appearance of alien enemies, enunciated in *The Vesta*[2] and more recently followed in *The Glenroy, cargo ex*,[3] has led the German legislator to grant alien enemies the right of appearance only upon condition of reciprocity.[4] This retrograde step was probably inevitable and serves to emphasize the need for a change in the British practice.[5] A happier example of a beneficial change was that introduced into French law by the Decree of 2 September 1939, which repealed the previous rule as to jurisdiction under which the French Court would only hear claims to indemnities in proceedings to uphold the validity of a seizure.[6] This restriction has been the object of some criticism. It has no parallel in the other prize jurisdictions of the First World War. But these

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[1] The following are the principal regulations governing procedure in the prize courts in force during the Second World War: Great Britain: Prize Court Rules, 1939, *S.R. & O.* (1939) No. 1466/L.23, and similar Orders issued locally for the overseas prize courts; Germany: *Prisengerichtsordnung* of 28 August 1939, *RGB.* (1939), i. 1593, amended by Law of 19 December 1940, ibid. (1940), i. 1629; Italy: *Norme di Procedura* of 5 September 1938, *G.U.*, 9 December 1938, amended by Royal Decree of 14 June 1941, ibid. 3 September 1941; Dutch East Indies: *Prijsgedingreglement voor Nederlandsch-Indië*, 1941, in *Nederlandsch Staatscourant* (London), 30 August 1941; Curaçao: *Prijsgedingreglement*, 1940, *Publicatieblad* (1940), No. 77, repealed and re-enacted by *Prijsgedingreglement*, 1945, ibid. (1945), No. 92; Turkey: Prize Law of 17 July 1940, Articles 87 to 153, *Official Gazette*, 18 July 1940; Norway: Provisional Order in Council relating to Prize Courts of 18 April 1940, made permanent by Prize Law of 2 May 1947 (*supra*); France: Decrees of 2 September 1939, in *J.O.* of 3 and 13 September 1939, and many subsequent circulars and instructions.

[2] (1921), 3 *B. & C.P.C.* 897, at p. 909.

[3] (1943), *Ll.P.C.* (2nd) 135.

[4] *Prisengerichtsordnung*, Art. 36.

[5] In this connexion interesting possibilities are opened up by the Norwegian procedure under which, if there is no claimant, the court appoints an attorney to represent him: see *Prize Law 1947*, Art. 9, and *The Valencia*, decided by the Bergen Prize Court on 3 September 1947.

[6] Cf. particularly *The Insulinde No. 1* (1915), *Jurisprudence Française*, 21, and, on appeal (1916), ibid. 187; *The Gorontolo* (1915), ibid. 72, and, on appeal (1917), ibid. 350. Yet traces of the old system remain in that, before the *Conseil* can adjudicate, there has to be a *décision préalable* from the Ministry of Marine, and the *Conseil* only has jurisdiction if it rejects the claim: *Instruction* of 24 December 1939, Art. 7. See *The Ninfea* (1941), not yet reported; *The Ning-Po* (1946), not yet reported. The basis of this rule is the French conception of *droit administratif* and the limited competence of French administrative tribunals. The decisions of the French prize courts rendered up to the end of 1946 are to be published by the Imprimerie Nationale under the title *Prises Maritimes—Jurisprudence française de la Guerre, 1939–1945.* This volume was in the press when this article was written.

are exceptions. Generally speaking, the procedure governing prize proceedings in force during the Second World War was the same as that of the First World War, the new procedural codes adapting to the prize court changes in municipal procedure which had come about in the intervening period.

3. *The English Prize Court.* In England the Prize Court has remained a purely judicial tribunal. The High Court of Justice now has jurisdiction in prize under the Supreme Court of Judicature (Consolidation) Act, 1925, sect. 23.[1] Cases are assigned to the Probate, Divorce and Admiralty Division by sect. 56 (3) (*b*), and appeals are heard by His Majesty in Council in accordance with the proviso to sect. 27 (1). British Prize Law has been extended by the Prize Act, 1939, sect. 2, to any of the following: (*a*) British protectorates; (*b*) territories held under mandate of the League of Nations; and (*c*) any other country or territory in which for the time being His Majesty has jurisdiction in prize. Accordingly, jurisdiction in prize was given to the appropriate civil courts in Zanzibar,[2] a protectorate, in Palestine,[3] a British mandated territory, and in North Borneo.[4] The British Commonwealth was unique among the belligerents in having a plurality of prize courts with no clear limits to the jurisdiction of any of them.[5] The Prize Act itself applied to every territory in the British Commonwealth of Nations except Canada,[6] South Africa,[7] and Eire. The

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[1] 15 & 16 Geo. 5, c. 49.

[2] *S.R. & O.* (1939), No. 1138 (His Britannic Majesty's High Court for Zanzibar).

[3] *S.R. & O.* (1939) No. 1137 (The Supreme Court of Palestine). On 29 December 1939 it was reported that the German Government had protested to Great Britain and France regarding the use of mandated territories for war purposes: *B.I.N.* 17 (1940), p. 36. The Italian Prize Tribunal described Palestine as 'territory under British control', so that a Palestinian firm was regarded as British: *Minister of Marine* v. *Hanau* (part cargo *ex* S.S. *Cilicia*), 30 September 1941, *Boll.* ii. 207, at p. 209. But Palestine was never formally at war with any Axis Power. See Bentwich, 'The Mandated Territories during the Second World War', in *B.Y.* 21 (1944), p. 164. As to the exercise of prize rights within the territorial waters of French mandated territories see *Instructions* of 2 September 1939. The only other mandated territory in which a Prize Court was established was Walvis Bay, and there are no records of any cases being heard by the division of the South African Supreme Court having jurisdiction there.

[4] *S.R. & O.* (1939) No. 1136. (A new court, the North Borneo Prize Court, was created, the Judge being the Chief Justice of North Borneo or the senior Sessions Judge.)

[5] Outside London, British prize courts were established in Aden, Australia (New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, Western Australia), Bahamas, Bermudas, British Guiana, British Honduras, Burma, Canada (Charlottetown, Halifax, St. John, Montreal, Ottawa, Quebec, Victoria), Cape of Good Hope, Ceylon, Cyprus, Falkland Islands, Fiji, Gambia, Gibraltar, Hong Kong, India (Bombay, Fort William, Madras, Sind), Jamaica, Kenya, Leeward Islands, Malta, Mauritius, Natal, North Borneo, Palestine, Sierra Leone, South-West Africa, Straits Settlements, Trinidad, Windward Islands, and Zanzibar. The Officer in Command has a discretion as to the port into which he will bring his prize. For the Dutch Empire separate prize courts existed in Surinam, Java, and Curaçao, but there was no central court with a residuary or overriding jurisdiction comparable to that of the London Prize Court.

[6] See the Canadian Prize Act, 1945, 9 & 10 Geo. 6, c. 12, replacing the emergency regulations which had previously governed the Canadian prize courts.

[7] At first, procedure in the South African courts was regulated by the Prize Court Rules of 1914 as amended, but by Proclamation No. 224 of 1941 (*Government Gazette*, 28 November

Prize Court Rules, 1939, did, however, apply to Canada. The various Reprisals Orders, to which we shall refer later, applied only in those prize courts in which the 1939 Rules applied.

The Supreme Court of Judicature (Consolidation) Act, 1925, has not removed the necessity for the grant of a commission to the prize court at the commencement of each war, despite the differences of opinion that had been expressed as to this.[1] The Prize Commissions, which were issued on the outbreak of war with each of Germany, Italy, Roumania, Bulgaria, Hungary, Finland, Japan, and Thailand,[2] follow the formula of those of the First World War, with the inclusion of references to aircraft, which, however, are also to be adjudicated upon in accordance with the 'course of Admiralty', &c.

4. *Continental Prize Courts.* The divergences in the organization and composition of the continental prize courts, about some of the features of which there has been some unfavourable comment since the First World War, have continued unchanged. In France jurisdiction in prize has remained in the hands of the old-established *Conseil des Prises*, an administrative tribunal operating under the old statutes, and appeals were heard, as previously, by the Head of the State on the advice of the *Conseil d'État*.[3] Although the Paris Court sat continuously, with changes in personnel, throughout the period of the war, it only adjudicated upon captures effected before the Armistice of 1940 or arising out of the operations for the liberation of France. In December 1943 the Free French authorities in Algiers issued a decree constituting a new *Conseil des Prises* for the territories under their control.[4] But this *Conseil* never functioned, and the cases which would have been brought before it were heard before the Paris Court after the liberation of France.

In Germany an *ad hoc* prize court of first instance, the *Prisenhof*, was created at the beginning of the war with its seat at Hamburg; at the same time an appeal court, the *Oberprisenhof*, was set up at Berlin. As in the First World War, both these quasi-judicial tribunals were of mixed composition, consisting respectively of three and four professional judges together

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1941) the Prize Act and the Rules of 1939 were applied to South Africa, including the Port and Settlement of Walvis Bay: *South African Law Journal*, 59 (1942), pp. 48–9. For a decision that the Prize Courts Act of 1915 is still in force in the Union, despite intervening constitutional changes, see *The Triglav* (1942), ibid., p. 152.

[1] Cf. Lord Parker's remarks in *The Zamora* (1916), 2 *B. & C.P.C.* 1, at p. 16, with those in *The Roumanian* (1915), 1 ibid. 536, at p. 546, and *The Sudmark* (No. 2) (1917), 2 ibid. 473, at p. 478.

[2] See note by Rowson in *L.Q.R.* 61 (1945), p. 133.

[3] For details see Colombos, p. 33. A Decree of 7 January 1941 reorganizing the French *Conseil d'État* preserved the right of appeal from the *Conseil des Prises* in that way: see Rousseau, *Principes généraux du droit international public*, vol. i (1944), p. 674. This has been maintained under the new Constitution, under which the Decree of 1941 was repealed.

[4] Decree of 16 December 1943, printed in *Bulletin Officiel de la Marine*, 1943–4, p. 13.

with one representative of the Navy—an improvement upon the courts of the First World War when professional lawyers were in a minority.[1] In April 1941 a second prize court of first instance was set up in Berlin, with jurisdiction over captures effected in the Mediterranean.[2] At the outbreak of the war with Russia the jurisdiction of this court was extended to captures effected in the Arctic, Baltic, and Black Seas as well as the Mediterranean.[3] Disputes as to jurisdiction were to be settled by the President of the *Oberprisenhof*. In Italy[4] (where the name of the tribunal was changed from *Commissione delle Prede*—as it had been in the First World War—to *Tribunale delle Prede*) the Prize Court, which was a quasi-judicial tribunal, had a more independent status than its predecessor. In the Dutch East Indies[5] and Turkey[6] the Tribunals were also quasi-judicial bodies of mixed composition consisting of varying proportions of professional judges and naval representatives, but in Curaçao, it seems, the Prize Court was a purely judicial tribunal composed entirely of professional judges.[7] The United States retained its previous practice of maintaining purely judicial prize courts. The ordinary Federal District Courts were given jurisdiction in prize at first instance.[8] No cases were brought in these courts until after the cessation of hostilities in Europe.[9] Subsequently, the pending proceedings were discontinued and the issues settled out of court. In Norway, too, the ordinary civil courts had jurisdiction in prize.[10] No prize courts functioned in the Soviet Union or in Belgium.

5. *International law and municipal law in matters of prize.* Generally speaking, there has been little change in the doctrines, developed during the First World War, as to the relationship between international law and the internal law of the state in the matter of prize. Thus, there being no change in the instructions contained in the Royal Commission to the British Prize Court, the attitude of the Court to international law remained unchanged.[11] In Germany, the *Reichskommissar* pointed out that the Ger-

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[1] Decree of 3 September 1939, carrying out the *Prisengerichtsordnung* (*RGB.* (1939), i. 1600). As to the composition of the courts during the First World War see Garner, p. 14. In the course of the war the seat of both these courts was transferred to less vulnerable areas.

[2] Second Decree of 9 April 1941, carrying out the *Prisengerichtsordnung* (*RGB.* (1941), i. 200).

[3] Third Decree of 24 June 1941, carrying out the *Prisengerichtsordnung* (*RGB.* (1941), i. 332), in force from 22 June 1941.

[4] Laws of War, Arts. 218–27: see also Bassi, 'Sul Giudizio del Tribunale delle Prede', in *Diritto Marittimo* (1940), 508; Vitali, 'La Riforma della Costituzione del Tribunale delle Prede', ibid. (1941), p. 167; and Sandiford, 'Il Tribunale delle Prede', in *Annuario Italiano di Diritto Internazionale* (1941), p. 59.

[5] *Prijsgedingreglement voor Nederlandsch-Indië*, Art. 3:2.

[6] Prize Law, Arts. 92, 93.

[7] *Prijsgedingreglement* 1945, Art. 2: re-enacting *Prijsgedingreglement* 1940, which was identical.

[8] See United States Code, 1940 edition, Title 34, ch. 20, ss. 1131–58, and Supplement V, ibid., ss. 1159–66.

[9] Knauth, 'Prize Law Reconsidered', in *Columbia Law Review*, 46 (1946), p. 69.

[10] Prize Law 1947, Art. 6.

[11] For example: 'I doubt whether it is possible, by what is merely a municipal rule of proce-

man prize judge is in an entirely different position from that of the English judge: the latter is bound by precedents and regularly refers to the general principles of international law, but the German judge has to apply a German statute and is bound by its terms.[1] None the less, reference is frequently found in the German judgments to the principles of international law on matters as to which the *Prisenordnung* is silent or ambiguous.[2] In France, the *Conseil des Prises* adopted towards the Naval *Instructions* of 1934 an attitude similar to that taken in the past to the *Instructions* of 1912.[3] The Italian Tribunal was likewise as strict as the former Prize Commission in interpreting its duty to apply the internal law of the state.[4]

6. *The Declaration of Paris.* All the newly published codes give effect, to a greater or lesser degree, to the four Articles of the Declaration of Paris.[5] The sole exception is the Dutch *Prijsreglement*, which is silent altogether on the question of blockade. However, the real importance of the Declaration to-day lies not so much in the exemptions from capture for which it stipulates, as in the influence it has had upon the nature of the proof which the prize court requires. The conception of contraband has been so greatly developed that the Declaration of Paris has almost ceased to be of practical import. The Dutch Government has, indeed, pointed out that the extension of the contraband lists has had the effect of nullifying the exemptions from capture granted by Articles 2 and 3 of the Declaration.[6] On the other hand, the Declaration was quoted by the Italian

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dure, to substitute for a period recognized by the usage of nations some period which depends solely upon such rule, and I have asked in vain for anything which suggests that other countries during the last war accepted as authoritative this reduction in the period': *per* Lord Merriman in *The Alwaki and Other Vessels* (1940), *Ll.P.C.* (2nd), 43, at p. 47. The validity of the Reprisals Orders in Council has not been discussed by the British prize courts.

[1] *The Dutch Pilot-Boat No. 19*, decision of 1 March 1941.

[2] Cf. the same judgment, *passim*: for an elaborate attempt to reconcile the terms of the *Prisenordnung* with international law see Lehmann, *Die Neue Deutsche Prisenordnung, ihre Stellung zum Völkerrecht* (thesis, Würzburg, 1941).

[3] Rousseau, op. cit., vol. i (1944), p. 849.

[4] Garner, p. 200; and Rowson, 'Italian Prize Law, 1940–43', in *B.Y.* 23 (1946), p. 282, quoting *Minister of Marine* v. *Hellenic Lines, Ltd.* (S.S. *Athinai*): *Boll.* ii. 302. The Tribunal explained its view as being that if the internal law of the State does not conform to international law, then the matter only affects the international responsibility of the State, and is outside the jurisdiction of the Tribunal. But where the internal law incorporates treaty provisions the Tribunal will interpret the internal law in the same way as the Treaty has been generally interpreted: *Minister of Marine* v. *Anglo-Palestine Bank, Ltd.* (part cargo *ex* S.S. *Cilicia*), 10 October 1941: *Boll.* ii. 227. See also Sandiford, *Diritto Marittimo di Guerra* (6th edn. 1940), for an analysis of the Laws of War against the background of international law.

[5] German *Prisenordnung*, Arts. 2, 12, 15, 16, 44–52; Dutch *Prijsreglement*, Arts. 11, 52; Italian Laws of War, Arts. 134, 154 (extended to aircraft by Art. 248), 168–78; French *Instructions*, Annex T, No. 1. As to the blockade provision of the Declaration, the General Claims Commission between the United States and Mexico pointed out in its award in *The Oriental Navigation Company*'s case that 'economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the old rule of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war': *A.J.* 23 (1929), 435, at p. 436.

[6] Memorial addressed to all belligerent Governments in September 1939: *Dutch Orange Book*, November 1939, pp. 11–12.

Government in its Note of 3 March 1940 protesting at the British Reprisals Order in Council of 27 November 1939,[1] which was said to be incompatible with the 'fundamental principles of international law in particular with the Declaration of Paris'. In its reply of 19 March the British Government, while reserving its attitude as to the extent to which Article 12 could be regarded in existing circumstances as covering German exports carried in neutral ships, observed that the German action against which the reprisals had been ordered was itself a clear violation of Articles 2 and 3 of the Declaration.[2] An example of the way in which the Declaration still affects prize court procedure can be seen from *The Gloria*[3] where, in face of it, Lord Merriman was unable to accept a presumption that goods on board an enemy ship were necessarily enemy goods when the ship's papers were equivocal.

7. *The Hague Conventions.* The various Hague Conventions have come up from time to time for discussion and consideration. It is convenient to deal with them *seriatim.*

Breach of the Third Convention relative to the opening of hostilities was one of the formal grounds invoked by the British Government when it applied the restrictions of the reprisals order to the commerce of Japan.[4] This is an important precedent, especially in view of the substantial breaches of the Convention committed by the Axis Powers in the course of the war. The *Prisenhof*, in *The Wirpi*,[5] was faced with the argument that in view of this Convention prize rights cannot be exercised against neutral ships in the territorial waters of a country newly at war unless notification of the existence of the state of war is communicated by the belligerents to the neutral state. The Court held, however, that it was immaterial how the existence of the state of war came to be known; Article 2 of the Convention only referred to the duties imposed by the existence of war upon neutral states as such, for whom notification is necessary, and not to the liabilities imposed upon neutral subjects by the existence of war. The state of war is an absolute one affecting all neutrals to the same extent, whether or not they have been informed of it. This was the first time that any question of the Third Hague Convention had been raised in any prize court.

The Sixth Convention, relative to the status of enemy merchantmen in national ports on the outbreak of hostilities, is closely connected with the third. Most of the codes incorporate its provisions in one form or another, with analogous provisions taken from the Declaration of London concerning goods originally innocent and declared contraband subsequent to the departure of the vessel, in each case on condition of reciprocity.[1] However, in practice no days of grace were granted.[2] The status of the Convention was in some doubt owing to its 'general participation' clause. Not only had it been denounced by the British Government in 1925,[3] but some of the belligerents, particularly some of the states which had gained their independence since 1907, may not have been parties to it. The British Prize Court in *The Pomona*[4] and the *Oberprisenhof* in *The Leontios Teryazos*[5] both held that the Convention was not declaratory of customary international law. The *Prisenhof* also rejected arguments based on the Convention in cases where the parties claimed release of ships and cargoes seized in the course of the invasion of Norway.[6] The important cases which arose in the Second World War concern ships which had been prevented by *force majeure* from leaving the port of the opposing belligerent before the outbreak of war. This problem had arisen in almost identical form in Great Britain, Germany, and Italy. In *The Pomona*[7] the vessel had been the object of proceedings *in rem* instituted before the outbreak of war, at the date of which she was actually under the arrest of the Admiralty Marshal. The facts at Hamburg in *The Naphtha Shipper*[8] were the same. Each court, relying as much upon what it knew of the decisions of the other as on its own precedents, condemned the vessel before it. There was a further complication in *The Pomona*, where an armed guard had been installed on the ship because of the risk of sabotage by her crew and fear of trouble with the dock-workers. Lord Merriman denied that *force majeure* of this nature altered the legal position, and held that the installing of the armed guard did not amount to the imposition of an anticipatory embargo. The *Prisenhof* also held consistently that neither the Convention nor Article 31 of the *Prisenordnung*, which provided for the payment of compensation for certain neutral contraband cargoes where the vessel was ignorant of the contraband list, could apply where contraband cargoes on their way to England or France had been captured during the operations in Norway.[1] Similarly, in *The Athos II*,[2] the *Conseil des Prises* condemned without compensation a cargo of contraband loaded before the outbreak of war when the vessel, having called at an intermediate port after the outbreak of war, was therefore deemed to have knowledge of the French contraband list. The Italian law and practice were entirely different. The relevant statutory provisions authorized only the sequestration of enemy vessels in Italian ports on the outbreak of war.[3]

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[1] *S.R. & O.* (1939) No. 1709; see *infra*, p. 195.

[2] *Parl. Papers*, Italy No. 1 [1940], Cmd. 6191.

[3] (1940), *Ll.P.C.* (2nd), 11.

[4] Order in Council of 12 December 1941: *S.R. & O.* (1941) No. 2136. For some of the implications of this see Rowson, 'Modern Blockade: Some Legal Aspects', in *B.Y.* 23 (1946), p. 346.

[5] Decision of 28 March 1941.

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[1] Italian Laws of War, Arts. 146–9; Dutch *Prijsreglement*, Arts. 75–8; French *Instructions*, Arts. 22, 57.

[2] By Order in Council No. 2629 of 11 September 1939 the Canadian Minister of National Defence was authorized to take all measures to seize all German ships in Canadian waters or on the high seas without days of grace: Hackworth, vol. vi, p. 569.

[3] *Parl. Papers*, Misc. No. 19 [1925], Cmd. 2564.

[4] (1942), *Ll.P.C.* (2nd), 121.

[5] Decision of 20 November 1942. Earlier the Hamburg Court had held in interlocutory proceedings connected with *The Naphtha Shipper* (order for requisition of 14 October 1939) that, consequent upon the British denunciation of the Convention and its general participation clause, Germany could not be considered to be bound by the Convention during the Second World War. Art. 18 of the *Prisenordnung* merely states that the provisions of the Sixth Hague Convention 'remain unaffected'.

[6] *The Anglo*, decided on 19 December 1941, and other cases.

[7] (1942), *Ll.P.C.* (2nd), 121. Similarly in 1940 in the Natal Prize Court in *The Hagen*, mentioned in Hackworth, vol. vi, p. 567.

[8] Decided on 19 March 1943.

The Seventh Convention, relating to the conversion of merchant ships into warships, was invoked in a few cases heard by the *Conseil des Prises*. These cases arose out of captures effected by Allied forces in North Africa. It was held that a tug occasionally used to supply enemy troops in the field does not, by such user, acquire the status of a warship, and that therefore prize proceedings are necessary on its capture to divest the enemy title.[4] The same was also held concerning a small fishing-vessel which was armed and occasionally put to similar military uses.[5]

Most of the new prize codes incorporate provisions giving effect to the Eleventh Convention relative to certain restrictions on the right of capture in maritime war,[6] except that the Dutch *Prijsreglement* omits to mention the inviolability of postal correspondence, a matter as to which there were some diplomatic exchanges.[7] The *Conseil des Prises* twice considered these exemptions in so far as they apply to fishing-vessels. In *The Fred Neuman*[8] it held that an ocean-going fishing-vessel owned by a Hamburg firm and captured at Bayonne was not covered by the Convention, which was only intended to benefit fishermen engaged in local trade, and not an enemy company engaged in a long-distance commercial venture. In a case where the fishing-vessel had been armed and occasionally used in connexion with the fighting in North Africa, the exemption granted by the Convention was held to be inapplicable.[1]

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[1] E.g. in *The Anglo*, decided on 19 December 1941.

[2] (1945), not yet reported.

[3] See *Minister of Marine* v. *A. Smith Associated Company* (*The Ulmus*), 18 July 1941: *Boll.* ii. 63, and *infra*, p. 208.

[4] *The Liguria* (1946), not yet reported.

[5] *The Persistante* (1946), not yet reported.

[6] *Prisenordnung*, Art. 20; Italian Laws of War, Arts. 115 and 145; Dutch *Prijsreglement*, Art. 55; French *Instructions*, Annex T, No. 4. The precedents of the First World War refusing such exemption to privately owned yachts have been followed in England: see *The Elvira III* (1939), *Ll.P.C.* (2nd), 8; France, *The Bernina* (1940), not yet reported; Italy, *The Ljubica*, 5 March 1943, *Boll.* ii. 456; and Germany, *The Echo*, in *Lloyd's List*, 1 February 1940.

[7] Correspondence with the United States Government regarding the censorship of mails, *Parl. Papers*, United States No. 1 [1940], Cmd. 6156; Correspondence with the Italian Government regarding the exercise of belligerent rights at sea, ibid., Italy No. 1 [1940], Cmd. 6191; *Dutch Orange Books* of November 1939 and April 1940. For condemnation of contraband seized from parcels mail see *The Hakosaki Maru* (1940), not yet reported. The question of the nature of postal correspondence, and its liability to examination and capture, was examined at length by the Italian Tribunal in *Minister of Marine* v. *Commercial Bank of Greece & others* (*re* a cheque taken from mailbags on board S.S. *Attiki*), 18 June 1943, not yet reported. The British and French courts followed the jurisprudence of the First World War in condemning items seized from mails.

[8] (1946), not yet reported. Cf. in London *The Herrlichkeit* (1940), *Lloyd's List*, 20 June.

The Thirteenth Convention, relative to the rights and duties of neutral Powers, was an important element in two diplomatic controversies, but was not raised in the prize courts. The American vessel *City of Flint* was seized as prize by a German warship in mid-Atlantic in October 1939. In addition to her German prize crew, some British prisoners were placed on board, and these were released when the vessel put into a Norwegian (neutral) port. From this port she sailed next day to a Russian (neutral) port, where the German prize crew was temporarily interned. Before her master could take her out, the prize crew was released and regained possession of the vessel. An American protest to Moscow relied on *The Appam*[2] case and the Convention. When, however, the vessel returned to a Norwegian port under the German prize crew, the Norwegian authorities interned the prize crew and released the vessel, which was accordingly not adjudicated upon by a prize court.[3] A more adequate application of the Convention was recorded after the Battle of the River Plate, when the German battleship *Admiral Graf Spee* and the merchant vessel *Tacoma* and their crews were treated in accordance with its provisions.[4] It is now clear that, in view of the events in the two World Wars, the Hague Conventions which regulate sea warfare have actually shared the fate of the Declaration of London. This is due as much to abuse on the part of the belligerents—particularly Germany—as to the inherent and inevitable weakness of a series of conventions whose intention was to protect the rights of neutrals rather than those of belligerents.

8. *The Declaration of London of 1909.* The most striking difference between 1914 and 1939 is the complete absence of the Declaration of London as a factor of any importance in modern prize law, despite the fact that the Declaration itself states that the Signatory Powers are agreed that the rules contained in it correspond in substance with the generally recognized principles of international law, and although many of the provisions of the Codes are taken, often literally, from the Declaration. The British Note of 27 January 1940 in connexion with the *Asama Maru* incident early made it clear that in the view of His Majesty's Government 'the Declaration of London, never having come into force, is not binding on any State

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[1] *The Persistante* (1946), not yet reported.

[2] (1917), 243 U.S. 124.

[3] For details see Hackworth, vol. vii, pp. 482–8. Apparently this case was mismanaged by the boarding officer and later by the German Vice-Consul at Hangesund and, with Hitler's consent, it was decided to let the vessel return to the United States unmolested.

[4] See *Uruguayan Blue Book*, outline of events prior to the sinking of the *Admiral Graf Spee* and the internment of the M.V. *Tacoma*, English translation (London, 1940).

and cannot be relied upon against His Majesty's Government as authority'.[1] This view was later confirmed judicially by Lord Roche in delivering the opinion of the Privy Council in *The Sidi Ifni.*[2] Exceptionally, the judgments of the *Prisenhof* occasionally refer provisions of the *Prisenordnung* to corresponding Articles in the Declaration of London.[3]

9. *Precedent in the Prize Courts.* With regard to the binding force of precedents in prize courts, in general the difference between the British and continental practices which were to be seen in the First World War continued to make themselves felt, although the English court has, once more, shown no disposition to regard precedents as 'shackles to bind'. Thus in *The Glenroy* (cargo *ex No. 2*)[4] Lord Porter examined a number of previous cases 'not because the point now under discussion has been decided in any of them, but because they establish the principle which must guide the Board'. There is a general rule that the British Prize Court is not bound by the decisions, and even less by the *obiter dicta*, of municipal courts, however eminent.[5] But the extensive examination of municipal authorities as to the nature of c.i.f. contracts in *The Gabbiano*,[6] and as to the nature of maritime liens in *The Prins Knud*,[7] indicates that there is a difference in its attitude to municipal precedent when, *in accordance with the rules of prize law*, the Prize Court is applying English municipal law, and its attitude when it is merely looking at the views of the English municipal courts *obiter* as it were. The opinions of jurists and foreign decisions are also cited in the British courts. To a lesser extent foreign prize courts examined their own and foreign jurisprudence of both World Wars, but not of earlier wars, to elucidate matters upon which the provisions of the codes were not clear. In the pleadings, support for the conclusions was regularly sought in decided cases and in the writings of jurists of all nationalities. In the *Prisenhof* reference was also made to the *travaux préparatoires* of the Hague Conference of 1907.[8]

III. *The right of prize: time, place, and object*

10. *Time of exercise of the right of prize.* The right of prize can only be exercised during the existence of a state of war. Some countries require

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[1] *Parl. Papers*, Japan No. 1 [1940], Cmd. 6166: this is reminiscent of Lord Parker's opinion in *The Hakan* (1916), 2 *B. & C.P.C.* 479, at p. 483, that 'the Declaration of London has . . . no validity as an international instrument'.

[2] (1945), *Ll.P.C.* (2nd), 200, at p. 204.

[3] E.g. in *The Standard*, decided on 19 November 1940; *The Mimona*, same date; *The Grängesberg*, decided on 22 September 1942. And in Italy, see *Minister of Marine* v. *Les Pouderies et Cartoucheries Helléniques* (*Part Cargo ex Attiki*), 11 July 1941; *Boll.* ii. 143.

[4] (1945), *Ll.P.C.* (2nd), 191, at p. 197.

[5] *The Glenroy* (1943), ibid. 135.

[6] (1940), ibid. 27.

[7] (1942), ibid. 99.

[8] *The Wirpi*, decided on 28 March 1941.

the promulgation of a special decree to bring into force the right of prize,[1] but this is not a requirement of international law. On the other hand, Article 14 of the Dutch *Prijsreglement*, which allows the exercise of the right of prize during the time when the Kingdom of the Netherlands is in a state of war *or armed conflict* with another Power, would appear to authorize an extension of the time in which the right can be exercised by permitting it during the period of an undeclared war. However, it is probable that, because of its far-reaching consequences, the right of prize derives from the existence of war in the formal sense and cannot be deduced from a state of armed conflict with a foreign Power falling short of war. A decision of a prize court affecting the nationals of third states rendered in respect of a capture effected during such a period of armed conflict may be of no international effect; and either would not pass a good title or would give rise to a valid claim for damages before an international tribunal or through diplomatic channels.

The exercise of the right of prize during the period of an armistice depends upon the terms of the armistice agreement. The armistice agreements concluded during the course of the war and at its close have given rise to a number of decisions which conform to this traditional doctrine. The matter has been principally discussed in the French and Italian courts, in connexion with both the Franco-Italian Armistice of 1940 and the Armistice between Italy and the United Nations of September 1943. The general principle was affirmed by the *Conseil des Prises* in *The Santa Flavia.*[2] This Italian vessel was seized in October 1944 while attempting to transport some Italian civilians from Tunisia to Pantellaria. Although her Italian nationality was unquestioned, the Court examined the terms of the Armistice of 1943 with Italy and found that it did not permit the continuance against Italian vessels of the right of prize by the United Nations. The law was stated to be that the right of capture cannot be exercised when hostilities at sea have ceased, except where there is hostile assistance or attempted breach of blockade. The vessel was held not to be guilty of either of these offences and was therefore released.

The situation arising out of the Franco-Italian Armistice of 1940 has come under detailed consideration in the Italian Prize Tribunal. According to Article 200 of the Italian Laws of War exercise of the right of prize is to cease with the end of the war. The Tribunal established that 'end of war' is not the same as 'armistice'. Accordingly, following established practice, it examined the terms of the Armistice Agreement itself to ascertain its effects on the exercise of the right of prize.[1] This examination led to the conclusion that the existence of this Armistice did not affect the exercise of the right of prize against French ships. Similar decisions were reached following the surrender of the Greek armed forces.[2] The French Court did not examine the validity or effect of this particular Armistice Agreement, but the situation created as a result of its breach by the Axis Powers which, on 11 November 1942, occupied certain territory of metropolitan France in defiance of it. This was a novel issue. In *The Liguria*[3] the *Conseil* simply held that this action on the part of the Axis Powers put an end to the Armistice, so that at the date of the seizure, in 1943, a state of war existed between France and Italy. In the same case the right of the Free French Forces to effect seizures was upheld on the ground that the Free French authorities enjoyed belligerent status in virtue of the recognition which had been granted to them by the British and Soviet Governments. On both these points the decision of the *Conseil des Prises* accords with the principles of prize law.

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[1] E.g. Germany: *Prisenordnung*, Art. 3, brought into force with effect from 3 September 1939, although hostilities with Poland began on 1 September 1939, by Decree of 3 September 1939 (*RGB*. (1939), i. 1600); Italy: Decree approving the texts of the Laws of War, 1938, Arts. 2, 5, and 10, brought into force by Decree of 10 June, 1940 (*G.U.*, 15 June 1940); but not Holland, Japan, or France. For the position in Great Britain see the terms of the Royal Commission to the Commissioners for exercising the office of Lord High Admiral.

[2] (1946), not yet reported.

There have been no decisions directly in point from the British courts, although German vessels captured as a result of the unconditional surrender of Germany have been condemned in prize.[4] The diplomatic protests made to Yugoslavia by the British and United States Governments in 1947 in the matter of the seizure of certain Italian vessels in apparent breach of the Armistice concluded between Italy and the United Nations also accords with the well-established international law on the subject.[5]

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[1] See in particular *Minister of Marine* v. *French Food Purchasing Commission in London* (part cargo *ex* S.S. *Paolina*), 13 June 1941: *Boll.* ii. 85, at p. 101.

[2] *Minister of Marine* v. *Cie Alais Groges et Camargne* (part cargo *ex* S.S. *Bosforo*), 4 July 1941: *Boll.* ii. 140; *The same* v. *Società Anonima della Costiera Greca A.E.* (*The Kriti*), 22 January 1943: ibid., 445, at p. 449.

[3] (1946), not yet reported. Cf. also *The Persistante* (1946), not yet reported.

[4] E.g. *The Mercur*: *Lloyd's List*, 26 November 1946.

[5] For details of the British protest see House of Commons, *Official Report*, 23 April 1947, col. 1014. The nine vessels there referred to were all merchant vessels which were beached or sunk off the Istrian coast as a result of Allied action during the war. Among them was the Italian luxury liner *Rex*. According to the terms of the Armistice with Italy, all Italian shipping was to be made available to the Supreme Allied Commander for the Mediterranean, for such purposes and periods as the United Nations may prescribe. It therefore follows that no individual Allied Government could claim the vessels, which must be at the disposal of the United Nations as a whole. The British and American Ambassadors in Belgrade on 17 and 18 February 1947 presented Notes to the Yugoslav Government protesting against the proposed seizure as being a violation of the armistice terms. This action was taken partly at the request of the original Italian owners of the vessels, who brought the matter before the A.M.G. authorities in Italy. The Yugoslav reply of 25 March 1946 was unsatisfactory, and a second Note of protest was therefore sent by Great Britain and the United States in mid-April. These cases should not be confused with the various seizures by the Yugoslavs of Italian fishing-smacks and small craft in Adriatic waters off the Istrian coast. Fifty-five of such vessels had been sequestrated in this way by the Yugoslavs between May 1945 and February 1947. Recent Anglo-American protests on the subject have referred to the agreements made by Great Britain and the United States with Yugoslavia in May 1945 fixing their respective zones of occupation in Venezia Giulia. The

It should also be noted that the British courts regarded France as a hostile destination, for the purposes of the law of contraband, after the Armistice of 1940.[1]

11. *Place of exercise of the right of prize.* All codes forbid the exercise of the right of prize in neutral or neutralized waters.[2] The Dutch Regulations adopt a novel definition of neutral territorial waters by referring to the rule of three nautical miles at sixty per degree of latitude 'except when otherwise declared by the Government itself of a non-enemy State with regard to the extent of its territorial waters'.[3] They do not make it clear, however, whether a capture effected within territorial waters is void absolutely, or only voidable at the suit of the neutral government concerned.

The German Court was several times faced with an objection to the exercise of the right of prize by the German forces occupying Norway in April 1940, on the ground that, in view of the German Proclamation of 9 April 1940 announcing the 'assumption of protection' by Germany over Norway,[4] such waters could not be regarded as other than neutral waters, especially as the formal declaration of war by Germany did not come until 27 April 1940.[5] The argument was rejected. In *The Thistlebrae*[6] it was held that as from the commencement of Norwegian military resistance, the start of which was placed in the early hours of the morning of 9 April, a state of war existed between Norway and Germany, and that therefore from that moment Norwegian waters became enemy waters and lost their neutral character. While this decision seems to accord with the general principles of international law, it would appear to be somewhat incompatible with the practice adopted by the German Government in September 1939 regarding the bringing into force of the right of prize.

In France the question arose of the legitimacy of the exercise of the right of prize in the territorial waters of Tunisia, over which country France held a protectorate under the Treaty of Bardo of 12 May 1881. The *Conseil des Prises* held that the right of prize was legitimately exercised

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Yugoslavs argue that the Italian vessels in question were found sailing in Yugoslav territorial waters. This dispute is still unsettled. For the terms of the Italian Armistice see *Parl. Papers*, Italy No. 1 [1945], Cmd. 6693, particularly Art. 14.

[1] *The Selandia* (1940), *South African Law Journal*, 59, p. 39; *Annual Digest*, 1938–40, Case No. 218. See below, p. 190.

[2] German *Prisenordnung*, Art. 5; Italian Laws of War, Art. 139; Dutch *Prijsreglement*, Art. 13; French *Instructions*, Arts. 3 and 4, and Annex R, No. 1. But the Norwegian Prize Law of 1947, Art. 1, would have condemned an enemy vessel as lawful prize regardless of the waters in which she was trading; this is similar to the British view (see *The Bangor*, (1916) 2 *B. & C.P.C.* 206), unless the neutral State intervenes, as, for example, in *The Pellworm* (1922), 3 ibid. 1053.

[3] Holland herself accepts the three-mile rule: Higgins and Colombos, *International Law of the Sea* (1943), p. 67. For the views of His Majesty's Government on the proposed 300-mile safety zone enforced by the twenty-one American Republics in the so-called Panama Declaration of 3 October 1939 see *The Times* newspaper, 16 January 1940, p. 7.

[4] *B.I.N.* 17 (1940), p. 498.

[5] Ibid., p. 551.

[6] Decision of 4 October 1940, followed in many other cases: as to Dutch territorial waters see *The St. Denis*, decided on the same date.

there, for, in addition to the treaty provisions placing the foreign relations of Tunisia under the control of France, the presence of enemy forces there and the successive acts of war committed by them within the territory and the territorial waters of Tunisia had transformed that country into an operational zone in which the right of prize could be exercised.[1] The decision is similar to one given previously by an Italian tribunal which upheld the validity of a capture effected at Bordeaux, an enemy port. The basis of that decision was also the rule that the right of prize can be exercised in any territory nominated as a theatre of war, including enemy territory occupied by forces of a country allied to Italy.[2]

The jurisprudence of the First World War as to the seizure of maritime cargo on land was followed in the Second World War. The German *Prisenordnung* was specially altered to permit this practice.[3]

12. *Object of exercise of the right of prize.* In this respect two novel problems arose during the Second World War, namely, captures of and from wrecks, and captures from public vessels and of publicly owned cargoes. On each of these topics the German Court provided the main decisions. Any difficulty concerning wrecks arises from the suggestion—which is, however, not supported by any known practice of the past—that for humanitarian reasons enemy ships wrecked off their adversary's coast should not be liable to capture.[4] It is difficult, even on theoretical grounds, to understand the force of this reasoning, which, it may be noted, does not distinguish between wrecks caused by acts of God, negligent navigating, or belligerent action. Actually, the cases which arose were concerned with wrecks caused by belligerent action. Both the German and the Italian courts established the proposition that there is nothing inherent in the nature of a wreck caused in this way to prevent it or cargo taken from it from being the object of a valid seizure in prize.

The German cases concerned seizures carried out in Dutch harbours after the German invasion of Holland. In *The Roek*[5] the *Prisenhof* held that, having regard to Article 1 of the *Prisenordnung*, according to which prize law confers authority to detain and search enemy and neutral vessels at sea as well as to deal with such vessels and their cargoes in accordance with the law, the right of prize could by analogy be extended to cases where the ship has become a wreck, so that the cargo of a wreck may be declared good and lawful prize to the same extent as the cargo of a ship at sea can be so declared—limited, however, to cargoes taken from the wrecks of private vessels at sea. In *The Dutch Pilot Vessel No. 19*[1] this view was followed and extended to include cargo which, loaded on board an enemy public vessel itself taken as war booty and not subject to the jurisdiction of the prize court, had been scattered over a considerable area of a canal bed by the force of a mine explosion which had sunk the vessel. This cargo consisted of 816 gold ingots, the property of a Dutch bank, and was condemned upon many grounds not relevant here. What is interesting, however, is that after the explosion the ingots had been recovered as a result of a lengthy search in which elements of the land forces had participated, and placed for safe custody in the vaults of the very bank whence they had originated. In this connexion it was held that they had not lost their character of maritime cargo, on the analogy of cases such as *The Roumanian*[2] and similar French and Italian cases not specifically cited. As mentioned, the doctrines of these cases are now incorporated in Articles 4 (iii) and 68 (2) (iv) of the *Prisenordnung*.

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[1] *The Liguria* (1946), not yet reported.

[2] See *Minister of Marine* v. *Montmorency Paper Co., Ltd., and Others* (part cargo *ex* S.S. *Capo Lena*), 8 January 1943: *Boll.* ii. 436.

[3] New Article 68 (2) (iv), added by Law of 19 December 1940: see *The Dutch Pilot Vessel No. 19*, decided on 1 March 1941; Italy: see *Minister of Marine* v. *Cia Swift de la Plata S.A.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941 (*Boll.* ii. 29); France: cf. *The Finland* (1945), not yet reported; England: *The Glenearn* (cargo *ex*) (1941), *Ll.P.C.* (2nd), 63; *The Kanto Maru*, [1942] *South African Law Reports* (Natal Provincial Division), 311.

[4] See Higgins and Colombos, op. cit., p. 421, where it is expressly stated that this rule is not recognized in any international agreement. Nevertheless, De Pistoye and Duverdy, *Traité des Prises Maritimes* (1859), vol. ii, pp. 89–91, give some interesting cases concerning ships wrecked off the French coasts and then captured. The general principle which emerges is that such ships have to establish their neutrality as do all other vessels: *The Anna-Catharina* (3 Messidor, Year IX). See also the case of *The Schooner Charity* (1861), cited in Robinton, *Introduction to the Papers of the New York Prize Court, 1861–1865* (1945), p. 139.

[5] Decided on 24 January 1941.

The Italian Tribunal, in *The Kriti*,[3] condemned the salvaged hulk of a Greek (enemy) vessel which had sunk after a bombing attack carried out by Italian warplanes. The judgment contains an interesting account of the development of the legal concept of 'ship', commencing with the *Digest*[4] and concluding with some French and Italian decisions of the First World War. But it does not consider whether the warplane acted in accordance with the provisions of the Laws of War in its action which resulted in the sinking of the vessel.

On the assumption that enemy public vessels fall to the state as war booty without the need for a decree of the prize court, the main question which arose before the *Prisenhof* in *The Dutch Pilot Vessel No. 19*[5] was whether private property on board such ship could also be dealt with as war booty or whether condemnation through the prize court was necessary. The Court rejected the alleged British doctrine[6] that private property on board such vessels shares the fate of the vessels, and went on to hold that in every case where private property is found on board a public ship proof must be brought to show whether it is enemy or neutral private property. To leave the decision in the matter to the prize court would, following the general tendency of German prize law,[1] secure the greatest measure of protection to private property and to the rights of neutrals. Interpreting Article 1 of the *Prisenordnung* literally, the Court found that it contained no provision whereby private property upon a vessel itself war booty was to share the fate of the vessel, that such treatment could not be applied to it by analogy, and, therefore, that such property was to be brought before the prize court.

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[1] Decided on 1 March 1941.

[2] (1914), 1 *B. & C.P.C.* 75; on appeal (1915), ibid. 536.

[3] *Minister of Marine* v. *S.A. della Costiera Greca* (S.S. *Kriti*), 22 January 1943: *Boll.* ii. 445. And in France, *The Nordmeer* (1946), not yet reported.

[4] *Digest*, Book I, para. 14, *D. de Fluminibus* 43, 12, 'navis appellatione etiam rates continentur', quoting from the case of the *Dredgers Captured in the Insonzato* (1917), *Jurisprudence Italienne* 199, at p. 204.

[5] Decided on 1 March 1941.

[6] See Oppenheim, *International Law*, vol. ii, § 185. The judgment actually quotes from the

The more difficult problem, however, which arises from the expansion in modern times of state trading enterprises, is that of the exercise of the right of prize against neutral state-owned ships and cargoes. It is doubtful whether Professor Verzijl's categorical statement that such property is inviolable and therefore outside the right of prize[2] can be accepted to-day. International law on this subject is in its infancy. The nearest precedents which have at all been tested in practice are those concerning the exercise of belligerent rights against neutral ships sailing under convoy of a warship of their own nationality. On this subject international practice exhibits great divergences.[3] Thus, Great Britain asserts her right to this.[4] German practice goes no further than to require the convoying warship to furnish assurances as to the convoyed vessels, failing which other action can be taken.[5] Italy[6] and Japan[7] take the same view, while France[8] and Holland[9] hold that neutral vessels under convoy of their own warship cannot be searched. There is an alternative precedent, untested in practice, in the provisions of a few of the codes and in isolated decisions regarding neutral state-owned ships other than warships and state-owned cargoes. Thus according to German law only warships and other vessels exclusively intended and used for purposes of public admini-

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edition of 1921, but this passage is retained in the latest edition (1940). The doctrine rests upon a single decision of Lord Stowell in *The Fanny* (1814), 2 *E.P.C.* 202.

[1] The Court pointed out that Art. 1 of the *Prisenordnung* of 1939, which conveyed the general authority to exercise the right of prize without reference to the prize court against vessels falling within certain classes, is more restricted than Art. 1 of the *Prisenordnung* of 1909. This was given as an example of the tendency of German prize law.

[2] Verzijl, p. 313.

[3] See in general Gordon, *La Visite des Convois Neutres* (1935).

[4] E.g. Correspondence respecting the Despatch of a Dutch Convoy to the East Indies, *Parl. Papers*, Misc. No. 13 [1918], Cd. 9028. Cf. also British Memorandum to the London Naval Conference of 1908, ibid., Misc. No. 5 [1909], Cd. 4555, p. 33.

[5] *Prisenordnung*, Art. 34.

[6] Laws of War, Art. 187.

[7] Navy Law of 1914, Art. 97.

[8] *Instructions*, Art. 110.

[9] *Prijsreglement*, Art. 24.

stration and not for purposes of trade are not subject to the right of prize.[1] The implication is that neutral state-owned merchant vessels may be subject to the right of prize. The Dutch practice subjects non-enemy state ships to verification of papers. It is not stated what treatment would be accorded them if their papers were not found to be in order.[2] French, Italian, and Japanese law is silent on this point. Some slight guidance is to be found in the English courts. Thus in *The Sidi Ifni*[3] the cargo, which was condemned, belonged to a concern which was described as 'an official body of the Spanish Government'. However, in that case no claim was entered by the owners of the cargo. If cargo owned by a neutral state can be condemned, then, it is submitted, this also applies to a ship belonging to a neutral government. It should be observed, however, that this view is contrary to that of the British courts regarding the immunity of foreign publicly-owned vessels *in peace-time*,[4] although the Brussels Convention on the Immunity of State-owned Ships of 1926 gave a right of suspension in war-time, limited to the arrest, seizure, or detention of ships or cargoes belonging to the state.[5]

In addition to these formal rules, it should not be overlooked that a neutral state which permits its publicly-owned ships to carry cargo which would be subject to confiscation if carried in a privately-owned vessel, or whose publicly-owned ships are guilty of any form of conduct which would render them liable to condemnation if they were privately-owned vessels, would itself be guilty of disregarding *pro tanto* the law of neutrality, and the belligerent harmed by such disregard would be free to take whatsoever measures of self-help it deemed necessary.

There have been no new developments concerning the position of the personal effects of the crew and passengers, or the ship's fittings. The German and Dutch Codes[6] exempt from capture the personal effects of the captain, crew, and passengers of prizes of war. Similar exemption has been granted by the courts in Italy,[7] France,[8] and Great Britain,[9] except that here such exemption is granted not as of right but, which seems to be less satisfactory, by the Crown in the exercise of its bounty. The *Conseil des Prises* did not make any order for the restitution of the personal effects of the crew of an enemy vessel which had been abandoned by her crew during the German retreat from France, leaving some of their effects on board.[1] This exemption, generally speaking, does not extend to the ship's fittings, at all events unless there are special reasons for holding otherwise.[2]

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[1] *Prisenordnung*, Art. 1 (1): *The Dutch Pilot Vessel No. 19*, decided on 1 March 1941. This is parallel with a decision of the German Civil Court of Appeal at Hamburg, affirmed by the Reich Supreme Court, in *The Visurgis and The Siena*, that no immunity from civil jurisdiction attached to a vessel unless it was operated by a state and used exclusively for governmental and non-commercial purposes: *Annual Digest*, 1938–40, Case No. 94.

[2] *Prijsreglement*, Art. 10 (2).

[3] (1945), *Ll.P.C.* (2nd), 200.

[4] *The Parlement Belge* (1878), L.R. 5 P.D. 197; reaffirmed in *The Cristina*, [1938] A.C. 485.

[5] Higgins and Colombos, op. cit., p. 174. This Convention has not been ratified by Great Britain.

[6] *Prisenordnung*, Arts. 13 and 17; *Prijsreglement*, Art. 59.

[7] *The Ljubica*, 5 March 1943, *Boll.* ii. 456.

[8] *The Santa-Fe* (1940), not yet reported.

[9] *The Pomona* (1939), *Ll.P.C.* (2nd), 1; *The Steaua Romana* (1944), ibid. 167.

IV. *The right of prize: enemy character*

13. *The determination of enemy character.* There is no controversy as to the condemnation of ships the enemy nationality of which is clear from the ship's papers. It is a universal rule that the nationality of a ship is in the first instance determined by the flag which she is entitled to fly.[3] Where the ship is not entitled to fly any flag, there exists a difference between the continental view, according to which liability to condemnation depends upon the enemy nationality of the owner,[4] and the British view, in which the commercial domicil of the owner is decisive. Similarly, the nationality and hence the liability to condemnation of cargoes depend in the continental view primarily upon the nationality,[5] while in the British view they depend primarily upon the commercial domicil, of their owner. In both cases, moreover, the British courts have led the way to a more stringent rule by looking to the real rather than to the formal control. Continental courts have not been slow to follow them. Thus we find that the doctrine of the controlling enemy interest of ships which was developed by the British courts during the First World War has been incorporated in the legislation of Germany, France, Holland, and Japan. In England, by an amendment to the Trading with the Enemy Act, 1939, a new section, 15 (1 A), was added giving the authorities power to apply by Order the provisions of the Act to any area specified in the Order as they apply to

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[1] *The Nordmeer* (1946), not yet reported.

[2] *The Ljubica, supra*; *The Biscaya* (1940), *Ll.P.C.* (2nd), 12, where the wireless installations were condemned by the British Court with the vessel; and *contra*, *The Steaua Romana, supra*, where the wireless installations were released owing to the existence of special contracts concerning them entered into by the Crown at a time when the vessel was under requisition.

[3] German *Prisenordnung*, Art. 6; Italian Laws of War, Art. 150; Dutch *Prijsreglement*, Art. 15; Japanese Navy Law, Art. 18 (as amended); French *Instructions*, Art. 20; and many decisions from all courts. For an interesting example of hesitation where the enemy nationality of an unregistered vessel was in doubt see *The Peter Rickmers* (1946), noted in Rowson, 'British Prize Law, 1944–1946', in *L.Q.R.* 63 (1947), p. 337, at p. 344. For the attitude of the Italian Tribunal where there were no ship's papers see: *Minister of Marine* v. *Nomicos* (s.s. *Nicolaos Nomicos*), 9 April 1943 (not yet reported), and *The Same* v. *Filipp and others* (*The Wawa*), 16 April 1943 (not yet reported). In this case, not only were there no ship's papers, but the very identity of the vessel was in dispute at one time!

[4] For an instance of the possible hardship resulting from the strict application of this rule see *The Bernina* (1940), not yet reported, where the *Conseil des Prises* condemned a vessel having no papers and no port of registry and belonging to a refugee from Germany, resident in France, whose two sons had volunteered for service in the French army but who himself still retained his German nationality on the outbreak of war.

[5] German *Prisenordnung*, Art. 8; Italian Laws of War, Art. 157. But an important exception is found in the Dutch *Prijsreglement*, Art. 20, which adopts a mixed nationality and domicil test.

enemy territory. It seems, however, that such an Order did not affect the national character of a ship flying the flag of the area in question so as to impose upon such ship enemy character and thereby render her liable to condemnation.[1] On the other hand, in Holland power was taken to declare that ships navigating under specified non-enemy flags were to be treated as enemy ships.[2] This ruling is hardly a satisfactory basis for a precedent. It is contrary to the basic principles of prize law to treat as enemy vessels those belonging to a state with which the capturing state is not formally at war.

There is some difference of opinion as to the treatment which should be accorded to vessels engaged in a voyage under the licence of the enemy government—an expression which is plainly intended to include a ship sailing under a navicert or ship's warrant. The German practice is that such a vessel is guilty of unneutral service.[3] According to the Japanese view, as it appears in the new Article 18 of the Navy Law, such a vessel is to be regarded as an enemy vessel. The difference is one of substance, as neutral cargo might be liable to condemnation if taken from a vessel condemned for unneutral service,[4] although it would not be so liable, under the Declaration of Paris, if the vessel had been condemned upon the ground of enemy character. The German practice, although its implications are harsher, is, it is submitted, less open to objection as it does not close the door to release if there are special circumstances.[5] Moreover, there seems to be substance in the argument that to sail under a navicert, especially when the obtaining of such a document has not been made legally necessary by the other belligerent, involves a real degree of unneutral service on the part of the vessel so sailing.

The determination of the national character of goods belonging to corporations or firms is a matter as to which there is still room for controversy, especially in view of the great variety of the internal regulations governing incorporation. In consequence, the Second World War has produced a number of important cases from various prize courts concerning the status, both international and internal, of corporations and firms. In British and Italian courts the questions merely concerned their nationality, and raised no new points of principle. Thus the Privy Council applied the doctrine of 'enemy house of trade' where the enemy concern was a separate company duly incorporated under the laws of the enemy state, and not merely an unincorporated branch of a neutral firm situate in an enemy state.[1] In another case Lord Merriman followed the view of the municipal courts that a winding-up order made by virtue of the Trading with the Enemy Act must be held to create, for the purpose of winding-up, a new entity, namely, the business ordered to be wound up, capable of possessing assets and having liabilities of its own, and therefore capable of appearing in the prize court to further a claim in respect of its London business.[2] Again, where before the invasion of Belgium a Decree had been passed by the Belgian Government enabling Belgian companies to transfer their commercial domicil to other countries, and a Belgian company, after the invasion had begun but before the occupation of its headquarters, had passed a resolution thereunder transferring its headquarters to London, it was held that such a company, having acquired first a temporary and later an indefinite licence from the Crown under the Trading with the Enemy Act and having been duly registered under the Companies Acts,[3] had acquired and retained a commercial domicil in this country entitling it to appear and prosecute its claim in a court of prize.[4]

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[1] This would seem to be the effect of the treatment to which certain Roumanian vessels were subjected: see *The Steaua Romana*, *The Oltenia* (1944), *Ll.P.C.* (2nd), 167. Cf. also *The Lawhill* (1940), *South African Law Journal*, 59 (1942), p. 46; *Annual Digest*, 1938–40, p. 575 (a Finnish vessel). But see *The Thep Satri Nawa* (1946), *Lloyd's List*, 1 December, *infra*, p. 205.

[2] Decree of 10 July 1941 (*Staatsblad* No. B.58): applied to the flags of Italy, Roumania, Bulgaria, and Hungary by Decree of 21 July 1941 (ibid., No. B. 59), Finland, 11 October 1941 (ibid., No. B.87), Thailand, 18 December 1941 (ibid., No. B.100).

[3] *Prisenordnung*, Art. 38 (iii); *The Ole Wegger*, decided by the *Oberprisenhof* on 18 December 1942. On 29 February 1940 the German Legation at The Hague warned neutrals against accepting navicerts and explained the official German view as being that neutral governments which accepted the navicert system thereby recognized the British blockade system which was contrary to international law: *B.I.N.*, 17 (1940), p. 326. The Italian Laws of War, Art. 179, and the Dutch *Prijsreglement*, Art. 66, are similar.

[4] Thus the British view: see *The Rebecca* (1811), 2 Acton 119, also *The Thor* (1914), 1 *B. & C.P.C.* 229, at p. 231. Arts. 45 and 46 of the Declaration of London would only condemn cargo belonging to the shipowner, but this is extended by Art. 42 (1) of the *Prisenordnung* to all enemy cargo on board a vessel liable to condemnation on the ground of unneutral service.

[5] Dictum of the *Oberprisenhof* in *The Ole Wegger*, decided on 18 December 1942: see further *infra*, p. 199.

The problem arose before the Italian Prize Tribunal in *The Athinai*.[5] Under Greek municipal law foreign limited liability companies are permitted on condition of reciprocity to carry on business in Greece while retaining their foreign nationality if they are so authorized by decree. The Prize Tribunal held that such a company carrying on business in Greece was to be regarded as a Greek company in the absence of international agreement providing otherwise, concerning which no evidence was adduced. Goods consigned to it from the parent company were condemned as enemy goods upon proof that the property had passed to it. But when the same Tribunal was faced with the difficult problem of ascertaining the nationality of firms composed of partners of mixed nationality, it avoided deciding the direct issue and condemned the goods on other grounds.[1]

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[1] *The Glenroy* (*cargo ex*) (*No. 2*) (1945), *Ll.P.C.* (2nd), 191, overruling the decision of Lord Merriman (1943), ibid. 153, that the doctrine was not applicable in such circumstances. Goods were accordingly condemned on it being shown that they were the concern of the enemy house of trade rather than of the parent (neutral) company, regardless of whether the property had passed, following *The Anglo-Mexican* (1916), 2 *B. & C.P.C.* 80, reversed on appeal (1918), 3 *B. & C.P.C.* 24.

[2] *The Glenroy* (1943), *Ll.P.C.* (2nd), 135, at p. 137, following *In re Banca Commerciale Italiana*, [1942] 1 Ch. 406; *In re W. Hazelberg A-G.*, [1916] 2 Ch. 503; *In re Th. Goldschmidt Ltd.*, [1917] 2 Ch. 194. See also *The Sado Maru* (1946), *Ll.P.C.* (2nd), 224. One important result of this case is that it makes it easier for enemy interests to further their claims in the British courts, prize and municipal. For this reason alone the decision is a welcome one.

[3] 19 & 20 Geo. 5, c. 23.

[4] *The Steaua Romana, The Oltenia* (1944), *Ll.P.C.* (2nd), 167.

[5] *Minister of Marine* v. *Socony Vacuum Oil Co. Inc.* (part cargo *ex* S.S. *Athinai*), 13 November 1942: *Boll.* ii. 404.

The most interesting case of this nature in the German Court concerned the status under Dutch law of the Netherlands Bank. At the time of the German invasion of Holland this Bank was the central note-issuing authority of the country. It was a company having a share capital, the directors of which were appointed by the shareholders except for the President and the Secretary who were nominees of the Dutch Government, which itself, however, held no shares. Under the Bank's statutes there was no limit to the possible number of directors who could be appointed by the shareholders. An advisory committee maintained liaison between the Bank and the economic life of the nation. In addition to its own directors, the Government appointed a special representative in the Bank's office. He took part in its activities, but only with an advisory vote. The Dutch state also had an interest in the profits. Despite the close tie, the *Prisenhof* held, in *The Dutch Pilot Vessel No. 19*,[2] that there was no legal identification between the Bank and the Dutch state which would entitle the state to enter a claim to the assets of the Bank seized as prize, and that the Bank was therefore to be regarded as a private juridical person, distinct from the state. For that reason its assets on board ship could not be seized automatically by the captor but must be brought before the prize court for adjudication.

The problem which arose in this case was not really one of prize law at all, but of private law. The real question was whether a semi-nationalized institution is to be regarded as an organ of the state or as a private concern. The importance of this case lies in the fact that the prize court was prepared to examine this question at some length and was not content merely to draw conclusions from the closeness of the tie which undoubtedly existed between the Bank and the Dutch Government.

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[1] Cf. *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941: *Boll.* ii. 3; *The Same* v. *Hanau* (part cargo *ex* S.S. *Cilicia*), 30 September 1941: ibid. 207.

[2] Decided on 1 March 1941. In the proceedings the claim of the German Reich was opposed by the German Kommissar appointed by the German occupation authorities in place of the former functionary appointed by the Dutch Government. In the same way the Italian Tribunal was prepared to adjudicate when the administrative authorities were not certain whether the cargo was the property of the enemy state, in which case prize proceedings would have been unnecessary: *Minister of Marine* v. *H.B.M.'s Government* (part cargo *ex* S.S. *Rapido*), 9 April 1943 (not yet reported). Italian law even allowed a claim to be made on behalf of the enemy state, *The Same* v. *French Food Purchasing Commission in London* (part cargo *ex* S.S. *Paolina*), 13 June 1941: *Boll.* ii. 85.

14. *Change of ownership*. As in the case of establishment of national character, so also when there has been a change of ownership or the contract is one of sale, there is a fundamental difference in the respective approaches of the continental and the British legal systems. The continental rule is comparatively simple. The matter is determined by the proper law of the contract which may itself be either the municipal law of the forum or its conflict of laws rule.[1] Where there is doubt, the risk test will be applied, that is to say, the property will be regarded as being with him who has the *jus disponendi*.[2] But mere formal considerations will not be allowed to defeat the captor's rights, for, as the Italian Tribunal has put it: 'The judicial treatment of maritime prizes, being determined by the rigorous necessities of war, cannot admit any forms of transaction which may give rise to fraud.'[3] These courts do not make a sharp distinction between *ante bellum* and *post bellum* contracts, and the codes categorically refuse to recognize any changes of ownership so as to divest cargo of its enemy character during transit[4]—except that Italy[5] and Holland[6] recognize the right of an earlier non-enemy owner to exercise his right of stoppage *in transitu* on the bankruptcy of the enemy owner.

The British rules, however, are more complicated. Transfer of property under *ante bellum* contracts even while the goods are in transit will be governed by English municipal or commercial law; transfer under *post bellum* contracts or contracts made *imminente bello* will be governed by prize law, the doctrines of which are very rigorous. The criterion, then, is the test of risk; transfer of property must be effected by actual delivery, and the property will be with him who has the *jus disponendi*.[7] The cases which have arisen in the Second World War all turn on the interpretation of particular types of c.i.f. contracts in order to establish these facts—the decisions of the First World War leaving a comprehensive jurisprudence about this branch of the law. Thus, in *The Gabbiano*,[1] a c.i.f. contract entered into before the outbreak of war contained a clause which Lord Merriman, after reviewing the municipal authorities, decided was inappropriate to a c.i.f. contract proper, because the goods were not buyer's risk in the events referred to in that clause. Accordingly, after finding that the British vendors had intended by this clause and by their actions to retain the right of disposal of the property in the goods, he ordered the release of the cargo to them. Another pre-war sale of goods which was ascertained to be within the meaning of the Sale of Goods Act, 1893,[2] under a c.i.f. contract was discussed in *The Glenearn* (*cargo ex*).[3] Here the agreement had been made frankly in expectation of war—not, as the President found, so as to avoid prize law but to protect the claimants' commercial interests. It provided for an exchange of cargo *ex* another ship if delivery of the cargo covered by the contract could not be effected. As the contract had been made *imminente bello* the strict rules of prize law were applicable so that the claimants could only establish their right to the goods if they had taken actual delivery of them before seizure. A third case involving a pre-war c.i.f. contract was *The Glenroy, No. 2*.[4] Here, after a sale c.i.f. from neutral vendors to a branch in Germany, an irrevocable letter of credit had been issued by a German bank authorizing a Japanese (neutral) bank to honour drafts presented in London for the price of the goods on account of the German branch. The inference drawn by Lord Merriman from these facts was that the property was not intended to pass until acceptance of the drafts by the London bank. This view was upheld by the Judicial Committee of the Privy Council which, however, condemned the goods on the ground that they were the concern of an enemy house of trade.

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[1] E.g. the Italian Prize Tribunal in *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941: *Boll.* ii. 3.

[2] Thus, where goods had been consigned under a c. and f. contract, the purchaser paying the insurance separately, the *Conseil des Prises* held that the transfer of property occurred when the goods were loaded on the ship: *The Almirante-Alexandrino* (1945), not yet reported. In the view of the Italian Tribunal such a sale only established a presumption that the property had passed as at the date of the loading, so that, in suspicious circumstances, the presumption would be rebutted, e.g. if no claimant entered an appearance after he, resident in Italy, had been personally served with notice of the proceedings: *Minister of Marine* v. *Aspinwall Ltd. and Others* (part cargo *ex* S.S. *Casaregis*), 21 May 1943 (not yet reported).

[3] *Minister of Marine* v. *The Cultivated Home* (part cargo *ex* S.S. *Cilicia*), 17 October 1941: *Boll.* ii. 237.

[4] German *Prisenordnung*, Art. 9: this repeats the rule of the old *Prisenordnung*, Art. 20 (*c*); France, *The El-Nil* (1940), not yet reported; *The Bronxville* (1941), not yet reported; Italy, *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941: *Boll.* ii. 3.

[5] Laws of War, Art. 158. There appear to be no cases on this point.

[6] *Prijsreglement*, Art. 20 (2).

[7] Particularly *The Miramichi* (1914), 1 *B. & C.P.C.* 137; *The Parchim* (1915), ibid. 579, on appeal (1917), 2 ibid. 489.

An obligation to notify safe arrival to a third party will in general be ignored so long as it does not affect proprietary rights.[5] That is to say, the existence of such an obligation affects neither the national character of goods nor the question of the passing of property in them. Clearly, however, this rule will not apply if the circumstances show that the contractual obligation is really a cover to hide proprietary rights.

A question which has often been raised in the past, in the prize courts of all nationalities, is whether non-proprietary interests such as mortgages, &c., can be recognized against the claim of captors. Because such claims leave unaffected the legal ownership, they have been almost universally rejected. Nevertheless, the issue has been again brought to the test since

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[1] (1940), *Ll.P.C.* (2nd); and compare part cargo *ex* M.V. *Tarn* (1944), *Ceylon New Law Reports*, vol. 45, p. 109.

[2] 56 & 57 Vict., c. 71.

[3] (1941), *Ll.P.C.* (2nd), 63.

[4] (1943), *Ll.P.C.* (2nd), 153; on appeal (1945), ibid. 191.

[5] *The Hawnby* (*cargo ex*) (1940), *Ll.P.C.* (2nd), 14; and in the Italian Prize Tribunal, *Minister of Marine* v. *Bank of London and South America, Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 27 June 1941: *Boll.* ii. 119.

1939 in a number of cases—always, however, with the same results.[1] Thus the British Prize Court, following Sir Samuel Evans's ruling in *The Marie Glaeser*,[2] has refused to admit claims in respect of British or neutral non-proprietary interests in enemy ships. The rule has been applied to claims for brokerage advanced by an English company[3] and to claims by British mortgagees.[4] Nevertheless, the Newfoundland Prize Court has suggested that if the British mortgagees were to take proceedings in the nature of foreclosure and had transferred the ship to British registry, the position might possibly be different; although the fact that they had merely enforced their right of security by taking possession of the ship could not affect the rights of captors to condemnation.[5] This is believed to represent the correct view of the law. As in the past, non-proprietary claims of this nature which are not admitted by the prize court fall to be dealt with by the Crown in the exercise of its bounty, and are outside the jurisdiction of the court.[6] The *Conseil des Prises*[7] and the *Prisenhof*[8] have both taken the same attitude, which must now be regarded as being an established rule of prize law. The question did not arise before the Italian Tribunal, but it can be assumed that, following the decision in *The Myrza Blumberg*,[9] it would have adopted a similar view. On the other hand, the question whether an appearance by an insurer will be recognized in the British Court has remained unanswered.[1] But the German Court regularly allowed neutral[2] and enemy[3] insurers to enter an appearance in suits for the condemnation of ships and goods in which they had an interest, without, however, apparently meeting their claims or discussing the legal principles involved. There are still many important *lacunae* in this branch of the law.

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[1] In connexion with this problem a clear distinction must be drawn between non-proprietary interests arising out of specific contracts and those arising out of certain facts or actions by third parties which it would be inequitable for capture to override. In *The Prins Knud* (1942), *Ll.P.C.* (2nd), 99, at p. 114, the Privy Council reaffirmed that the Prize Court is a court exercising an equitable jurisdiction, and admitted a claim for salvage services. There is no conflict between this decision and those relating to the inadmissibility in the prize courts of claims in respect of mortgages and similar contractual non-proprietary interests. Considerations of space forbid a discussion of the important developments in the matter of the equitable jurisdiction of the prize courts during the Second World War. It is hoped to consider these developments in a subsequent volume of this *Year Book*.

[2] (1914), 1 *B. & C.P.C.* 39; approved by the Privy Council in *The Odessa* (1915), ibid. 554.

[3] *The Rheingold* (1940), *Ll.P.C.* (2nd), 16.

[4] *The Konsul Hendrick Fisser* (1940), ibid. (two cases heard together).

[5] *The Christoph von Doornum* (1940), ibid. 49.

[6] See House of Commons, *Official Report*, 9 April 1940, col. 496; and *The Courland* (1943) *Lloyd's List*, 27 February, where the British chargee was advised to go 'cap in hand' to H.M. Procurator-General, who, since 1939, has exercised the functions performed during the First World War by the independent Prize Claims Committee. By the end of 1947 an aggregate sum of £551,739. 12*s.* 2*d.* had been recommended by the Procurator-General to be met in the exercise of the bounty of the Crown in favour of innocent British and neutral claimants: House of Commons, *Official Report*, vol. 445, cols. 534/5 (written answers), 17 December 1947. For the seemingly unique view of the Netherlands according to which the prize judge can submit a recommendation to the Crown for the making of an equitable payment see *Prijsreglement*, Art. 74.

[7] *The Bronxville* (1940), not yet reported.

[8] *The Fagervik*, decided on 24 January 1941; *The Naphtha Shipper*, decided on 19 March 1943.

[9] (1919), *Jurisprudence Italienne*, 392; although in *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941 (*Boll.* ii. 3), the Prize Tribunal said (at p. 22): 'The only person who has the right to oppose the condemnation of a prize is the owner of the captured thing. This right is usually refused to the other categories of interested persons, with, however, a small number of doubtful exceptions such as those occasionally found in the case of creditors having a charge on the thing captured. But this point is not for decision by the Tribunal in the present case.'

V. *Contraband and blockade*

15. *The contraband lists and their interpretation.* The most striking of the new developments which have taken place since 1939 concern contraband. Here more than in any other branch of prize law there is reflected the ruthlessness of modern total war and the obliteration of the distinction between combatant and non-combatant which total war implies. The basis of the law of contraband is unchanged. Goods are liable to condemnation if they simultaneously fulfil two conditions: they must further the warlike effort of the enemy, and they must have a hostile destination.[4] But the nature of contraband has changed radically in the wake of the achievements of modern science. The number of commodities and substances which do not further the warlike effort of the enemy is distinctly limited. The most unlikely articles often play a vital rôle in war-time autarchy. The law has reacted to this development by a complete change in the form of the contraband list—now a relatively brief document—and consequently in the way it is interpreted. Secondly, total organization for total war—full state economic control and its attendant system of widespread rationing—has led to new conceptions of the meaning of hostile destination, especially hostile destination required in the case of conditional contraband. This being so, the retention of the distinction between absolute and conditional contraband is surprising and even illogical, especially in view of the decisions rendered during the First World War. In British law the decision has ceased to be of real effect, with the possible exception

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[1] *The Salerno* (1946), *Ll.P.C.* (2nd), 207.

[2] E.g. *The Edda*, decided on 5 December 1940 (appearance by the Swedish War Insurance Fund).

[3] On condition of reciprocity only. In *The Anglo*, decided on 19 December 1940, the Norwegian War Insurance Fund entered an appearance. In both these cases the vessels were condemned for the carriage of contraband, and the claims of the insurers were not considered at all.

[4] In the words of the *Conseil des Prises* in *The El-Nil* (1940), not yet reported: 'The liability of goods to condemnation as contraband depends upon two factors, both of which have to be considered simultaneously, namely, their nature and their destination.' Somewhat similar ideas were expressed by the Italian Tribunal in *Minister of Marine* v. *Commercial Bank of Greece and others* (*re* a cheque taken from mailbags on board S.S. *Attiki*, 18 June 1943 (not yet reported)). In this case doubts were expressed whether a cheque drawn in Egypt on a London bank and endorsed to the order of a Greek bank, by whom it was sent to London for collection, was contraband of war despite the terms of the Italian contraband list. The Tribunal examined at length the liability of this form of negotiable instrument to seizure as contraband, ultimately concluding that it was irrelevant whether the cheque represented payment to or by the enemy.

of the case when the goods started their journey having a destination which was innocent. Yet it is noteworthy that several cargoes falling into the category of conditional contraband and destined to Germany were released by the French Court on the ground that they would not assist the enemy's warlike operations.[1] The distinction, indeed, was of more importance in France, where it affected the incidence of the burden of proof, as French prize law requires the captor to prove hostile destination, and not the claimant to prove innocent destination, except where the various presumptions shift the burden of proof.

Upon the outbreak of war in 1939 the belligerents exhibited considerable variations in the items which they included in their contraband lists. The British[2] and French[3] Governments, following the precedent which had been set by the American Government in its Instructions for the Navy of June 1917,[4] issued a contraband list in general terms instead of the detailed lists which appeared during the First World War. Closely following the arrangement and even the wording of the earlier American list, the two Allies departed from it in retaining the distinction between absolute and conditional contraband, placing in the latter category foodstuffs and clothing and articles and materials used in their production. The original German list was much shorter. It considered as absolute contraband all articles and materials which directly serve for armaments on land, at sea, or in the air, and are destined for enemy territory or for enemy forces. At the same time, all such articles and materials capable of being used for military as well as for peaceful purposes as were inserted in a list to be published by the Reich Government, and which are destined for the use of enemy forces or for the administrative departments of the enemy state, were regarded as conditional contraband.[5] However, shortly after the publication of the British list, the original list of absolute contraband was replaced by a more extended list closer to the British one. The German Proclamation announcing this explained that:

> 'the Reich Government, anxious to spare peaceful commerce at sea so far as possible, by the *Prisenordnung* proclaimed as absolute contraband only those articles and materials destined for enemy territory or enemy forces which serve directly for land sea and air armaments. Since, however, the British Government has published a list

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[1] Thus in *The Hakosaki Maru* (1940), not yet reported, a parcel of infants' clothing was released on this ground. Presumably this was before the existence of the German system of clothes rationing became known. The decision is illogical, if humane.

[2] Proclamation of 3 September 1939: *S.R. & O.* (1939), vol. ii, p. 3605; extended to Italy by Proclamation of 11 June 1940, *London Gazette*, Supplement, 12 June 1940, p. 3589; to Japan by Proclamation of 9 December 1941, *S.R. & O.* (1941), vol. i, p. 1267; to Roumania, Hungary, and Finland by Proclamation of 9 December 1941, ibid., p. 1268; to Bulgaria by Proclamation of 22 January 1942, ibid. (1942), p. 929; and to Thailand by Proclamation of 23 February 1942, ibid., p. 930.

[3] *J.O.* 4 September 1939, p. 11079.

[4] For text see Hackworth, vol. vii, p. 23.

[5] *Prisenordnung*, Arts. 22 (absolute contraband) and 24 (conditional contraband).

of absolute contraband far exceeding these limits, the Reich Government is now similarly compelled to extend the scope of absolute contraband.'[1]

By a second Proclamation of the same date foodstuffs and clothing, and articles and materials used for their manufacture, were declared conditional contraband.[2]

The original Italian list[3] had dropped the distinction between absolute and conditional contraband, and made no mention of foodstuffs at all. But on Italy's entry into the war the Italian Government also withdrew its earlier list and substituted all the items regarded by the British and French Governments as contraband as well as a list of its own closely following the revised German list. At the same time the classification of conditional contraband was restored, foodstuffs and clothing and materials used in their manufacture being declared conditional contraband.[4] In effect, therefore, the major belligerents had a common contraband list. The Dutch later provided an exception, for they treated as conditional contraband, in addition to foodstuffs and clothing, the materials or ingredients utilizable in the production of the various commodities mentioned as absolute contraband as well as bullion and coin, &c., items regarded by all the other belligerents as absolute contraband.[5] Japan made no change in her contraband lists. Despite the fact that the British and French lists followed the American list of 1917, there were protests at their extended scope from many countries, including some who had been Allied Powers in the 1914–18 War. Among the protests should be mentioned those of the Netherlands[6]—who also later protested to the German Government on similar grounds—and Italy.[7] The Soviet Union[8] objected in particular to the inclusion in the British contraband list of foodstuffs and articles intended for civilian consumption.[9]

The new form of the contraband lists required a complete change in the traditional methods of interpretation by the prize courts. In *The Minna*,[10] the Hamburg Prize Court rightly pointed out that it is irrelevant to consider whether an item is specially suitable or is intended for certain processing which would produce an article of absolute contraband. For the Prize Court, the only criterion is the objective adaptability of the material under consideration to the manufacture of articles and products listed as absolute contraband. Similarly, before the British Court would condemn goods as contraband it required sworn prima-facie evidence as to the use to which the items could be put.[1] This, of course, was not necessary in the First World War, when detailed contraband lists were issued.[2]

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[1] Ordinance of 12 September 1939, in effect from 14 September 1939: for text see *RGB.* (1939), i. 1751; Hackworth, vol. vii, p. 25.

[2] *RGB.* (1939), i. 1752.

[3] Laws of War, Art. 159.

[4] Decree of 16 July 1940, *G.U.*, 9 August 1940, No. 186.

[5] Decree of 31 May 1941, *Staatsblad*, No. B.44.

[6] *Dutch Orange Books*, November 1939 and April 1940.

[7] *Parl. Papers*, Italy No. 1 (1940), Cmd. 6191.

[8] *The Times* newspaper, 28 October 1939.

[9] A surprising suggestion was made (*obiter*) by the Attorney-General, Sir Donald Somervell, K.C., in *The Jurko Topic* (1941), *Ll.P.C.* (2nd), 89, at p. 91. He submitted that as a matter of law it is not necessary for belligerents to publish lists, though it is a matter of obvious convenience for everyone concerned and in modern days is always done. This suggestion overlooks the fact that many systems of law, including the British, regard the carriage of contraband and its consequences in a different light where the shipper is legitimately ignorant of the contraband proclamation and its content: if only for this reason the necessity for a proclamation would appear to be a matter of law.

[10] Judgment of 14 December 1939: see Hackworth, vol. vii, p. 27. Nevertheless the judgments of the German Court abound in examinations of various items so as to include them within a

16. *Hostile destination.* In addition to the virtual unanimity as to the nature of the goods liable to condemnation as contraband there was also practical unanimity as to the factors leading to a presumption of hostile destination as well as to the evidence which might displace such presumption. The legislation of the continental countries and their practice followed to a great extent British doctrine as developed through the history of British prize law and as now codified in the Maritime Rights Order in Council of 1916[3] and expanded in the many decisions rendered during and after the First World War. The influence of the growth of state control is seen in the French Instructions[4] and the Japanese Navy Law,[5] which alone have clear provisions for conditional contraband to be applied when the enemy state has taken measures to requisition or control the distribution of goods. In such circumstances there will be a rebuttable presumption of hostile destination when the goods are documented to an enemy port, or to a neutral port if the vessel is first to touch at an enemy port, or where they are documented to a neutral port which habitually serves as a port of transit to an enemy country and the goods are consigned to a neutral country.[6] In this connexion the Privy Council has held that judicial notice can be taken of the practice of the Italian Government, as the ruler of a totalitarian state, to take the goods for its own use or for disposal in whatever way would best help the war effort, as a matter of common notoriety.[7] This apparently avoids the requirement of strict proof of the relevant

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specific paragraph of the contraband list. For an example of a decision being deferred for further evidence as to possible use see *The Burgsten*, decided on 27 February 1941.

[1] *The Benmacdhui* (1939), *Ll.P.C.* (2nd), 6. For an application of this rule see, for example, *The Sakito Maru* (*cargo ex*) (1946), *Lloyd's List*, 29 January and 6 March.

[2] Cf. the List of Articles declared to be Contraband of War in *Parl. Papers*, Misc. No. 12 [1916], Cd. 8226. This contains over 170 items, arranged in alphabetical order, without distinguishing between absolute and conditional contraband because of the peculiar circumstances of the war.

[3] *S.R. & O.* (1916) No. 452. See also *Parl. Papers*, Misc. No. 22 [1916], Cd. 8293.

[4] Art. 47.

[5] New Art. 62 *bis*.

[6] Cf. *The Hakosaki Maru* (1940), not yet reported; *The Tormes* (1940), not yet reported; and, in the British Court, *The Alwaki and Other Vessels* (1940), *Ll.P.C.* (2nd), 44. This rule was less in evidence in Germany where, for example, a cargo of bacon, a commodity rationed in England, was condemned on the simple ground that it was consigned to Hull, an enemy base: *The Wirpi*, decided on 28 March 1941.

[7] *The Monte Contes* (1943), *Ll.P.C.* (2nd), 147.

enemy legislation. Moreover, foodstuffs 'of necessity' fall into the category of goods likely to assist in the warlike operations of the enemy.[1]

The two most important English cases on the subject concern the nature of the diversion from a hostile destination which will relieve contraband from liability to condemnation when the destination was innocent at the commencement of the voyage—if, for example, war had not broken out at that date. Regarding conditional contraband, the decision is one of the prize court, but in the case of absolute contraband the law had been restated with precision by the Privy Council. For this reason any conclusions which can be drawn—conclusions which support the view that in this respect, at least, there is a difference of substance between the two categories of contraband—must be regarded as of a tentative nature. In *The Glenroy* (*cargo ex*) (*No. 2*)[2] Lord Merriman held that actual diversion from the original hostile destination was sufficient to free conditional contraband from liability. Here the British shippers had voluntarily discharged in a British port a cargo originally destined for Germany under an *ante-bellum* shipment. If, however, the cargo is absolute contraband, then, in addition to actual diversion, abandonment of the original intention of hostile destination after the supervening outbreak of war must be made manifest by overt and unambiguous acts. Mere orders to the master to proceed to some port other than the original hostile destination are not a sufficient manifestation thereof if the doctrine of continuous voyage can be applied to the new destination.[3]

There have been one or two cases concerning cargoes consigned to France and seized after the Armistice of 1940. The courts properly regarded such a destination as hostile, and ordered, not the condemnation, but the requisition, of such cargoes.[4] The German courts were faced with a problem which was in many respects the converse of that which confronted the British courts, namely, whether cargoes destined for England were liable to condemnation when German military action, not seizure *jure belli*, compelled the abandonment of the original hostile destination. On principle it seems that it is immaterial whether the voyage was brought to an end by military action or by seizure in prize. At all events, that was the view taken by the German Court.

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[1] *The Sidi Ifni* (1945), *Ll.P.C.* (2nd), 200. For the condemnation of wool as absolute contraband see *The Capo Norte* (1946), *Lloyd's List*, 6 March 1946. The French Court regularly condemned clothing because of the measures taken by the enemy government to control it.

[2] (1943), *Ll.P.C.* (2nd), 153; on appeal (1945), ibid. 191, the cargo was condemned on these grounds and this ruling was not considered.

[3] *The Charles Racine, The Petter* (1944), *Ll.P.C.* (2nd), 177; on appeal (1946), ibid. 215. Cf. in France *The Hakone Maru* (1940), not yet reported, where absolute contraband which had been discharged at Marseilles while *en route* to Hamburg was condemned.

[4] E.g. *The Selandia* (1940), *South African Law Journal*, 59, p. 39; *Annual Digest*, 1938–40, Case No. 218. And see *Goods ex S.S. Maru Y.* (1941), *Ceylon New Law Reports*, 43, p. 157; *Annual Digest*, 1941–2, Case No. 179.

One result of the invasion of Norway—and the first attacks were directed against Norwegian harbours—was that the German authorities placed an embargo on the sailing of vessels from Norwegian harbours and then seized many of them in prize. The question which was then asked was whether this action had the effect of destroying the hostile destination which some of the vessels affected by it held before it took place. The general principle, which was early laid down and repeatedly followed, was that an intention of the shipowner formed by force and as a result of the advance of the German fighting services was of no consequence to the prize court.[1] It was also held more precisely in other cases that Article 23 (1) of the *Prisenordnung*, according to which the destination described in the ship's papers is conclusive, was decisive, and so rendered goods consigned, according to the papers, to enemy ports, and vessels carrying them liable to condemnation.[2]

It is to the French Court that we must look for most of the decisions on contraband during the Second World War. These, generally speaking, follow the lines laid down in the First World War, and do not call for particular comment.[3] But in one somewhat surprising case a cargo destined for Italy and captured two days *before* Italy entered the war *ex* a harbour warehouse was condemned as contraband. The reason given was that since the outbreak of armed conflict in Europe Italy had adopted an attitude not of neutrality but of non-belligerency, and that, as on the day of seizure she was on the eve of entering the war, the destination of the goods could not be regarded as innocent. The principle thus enunciated is probably open to objection. Prize law does not yet recognize any intermediate stage between neutrality and full belligerency. In this particular case, however, the defect seems to be more of a procedural nature and could presumably have been remedied by the expedient of a second seizure.[1]

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[1] *The Baltica*, decided on 5 December 1940.

[2] E.g. in *The Wirpi*, decided on 28 March 1941. Similarly, in regard to a neutral ship carrying contraband to Le Havre and seized in Nantes on the German occupation of that port: *The Grängesberg*, decided on 22 September 1942. These cases are a logical extension of the rules developed during the First World War and summarized by Verzijl (p. 774) in the following terms: 'Il s'ensuit . . . qu'il n'est pas nécessaire que la destination hostile ait existé déjà au moment de l'embarquement des marchandises ou de la partance du navire; elle peut être née plus tard. En règle générale, c'est le moment de la saisie qui est considéré comme décisif. Cependant la jurisprudence tient compte aussi des faits survenus ou pouvant survenir après la capture.'

[3] Thus, the following grounds have supported a presumption of hostile destination in cases where goods were consigned to neutral firms in countries bordering on enemy territory: statistical evidence about the consignees' trade with Germany: *The Groix* (1945), not yet reported, with the converse proposition that as the state must prove hostile destination, statistical evidence of diminishing trade led to release: *The Nyhorn* (1946), not yet reported, as did evidence that the consignee, suspected of maintaining commercial relations with Germany, had in fact made no exports to that country in the period 1938–40: *The Scarpedon* (1946), not yet reported; the enemy nationality of the members of the consignee firm, even when refugees from Nazi oppression: *The Nevada* (1945), not yet reported. Neutral legislation prohibiting the export of contraband goods to the belligerents was not adequate proof of innocent destination in view of the possibility of fraud: *The Groix, supra* (Belgium), *The Mount Taurus* (1945), not yet reported (Switzerland), nor was the release of analogous cargoes evidence of the innocence of that under adjudication: *The Groix, supra*. Similarly, no absolute probative effect was given to a declaration by the Swiss Central Office for the supervision of imports and exports that a given consignment was intended for consumption in Switzerland: *The Ary* (1945), not yet reported. As to the effect of a refusal of navicerts by the Allied authorities see *The Almirante-Alexandrino* (1945), not yet reported, and *The Nicolina-Matkovic* (1945), not yet reported, first cargo released but second condemned owing to suspect character of consignee whose name was included in the United States 'Black List'; and see *infra*, p. 198. As to the absence of agreement of non-re-export, see *The Saudardes* (1945), not yet reported. These are additional to the series of presumptions and rules established in the First World War.

The Italian Prize Tribunal exhibited, in this connexion, a rather remarkable tendency. In an early case, *The Tergestea*,[2] it laid down that where a claim is based upon the two grounds that the goods are contraband of war and enemy goods, the latter is wider in scope and should therefore be preferred by the Tribunal. The Italian jurists were not alone in this view, which was expressed also in the British[3] and French[4] courts. It is a view which has much to commend it inasmuch as it predicates that the condemnation is based upon fact rather than upon intention. However, from this starting-point the Tribunal, in order to establish the enemy character of the goods under adjudication, relied on those presumptions which are normally adduced to establish the hostile destination of contraband. In other words, it used presumptions commonly regarded as establishing a certain *intention* to establish a certain *fact*.[5] It is easy to see that, should such a practice become widespread, it would make it much easier for captors to establish the validity of their captures, and so render more illusory than at present the protection which is supposed to be available to legitimate neutral trade in the regular prize procedure.

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[1] *The Finland* (1945), not yet reported. For the French attitude to a second seizure see *The Ariadne* (1915), *Jurisprudence Française*, 109, (1916) ibid. 283, and, on appeal, (1916) ibid. 373; and *The Victoire ex-Virginia* (1916), ibid. 260, (1920) 2 *Décisions du Conseil des Prises*, 107, and, on appeal, (1924) 3 ibid. 115. Lord Merriman declined to condemn as contraband goods consigned through Italy before the outbreak of war: *The Belvedere* (1944), *Lloyd's List*, 22 December.

[2] *Minister of Marine* v. *North African Commercial Company* (part cargo *ex* S.S. *Tergestea*), 11 July 1941; *Boll.* ii. 57.

[3] *The Glenroy* (*cargo ex*) (*No. 2*) (1945), *Ll.P.C.* (2nd), 191, at p. 197; *The Patroclus and Other Vessels* (1944), *Lloyd's List*, 4 April.

[4] *The Rostock* (1940), not yet reported; particularly in the conclusions of the *Commissaire du Gouvernement.*

[5] For greater detail see Rowson, 'Italian Prize Law, 1940–1943', in *B.Y.*, 23 (1946), p. 282, at pp. 290 and 293 ff., where illustrations are brought showing the following presumptions being used to establish enemy character: goods consigned to a place which is under enemy control or used as an enemy supply base, goods consigned 'to order', or under other devices for concealing the nature of the consignee, goods consigned to a neutral who has acted as agent for or has furnished supplies to the enemy during the current hostilities, and so on. More far-reaching are two later decisions condemning as enemy property cargoes consigned to Montevideo, Uruguay, one to a named individual and the other to an incorporated body, the precise juridical status and nationality of which were unknown. Although each consignee being named in the bills of lading was presumed to be the owner, the presumption could be rebutted if, there being suspicious circumstances, no claim was made by the consignee. In these cases it was established to the satisfaction of the Tribunal that Uruguay was not observing strict neutrality in the war, serving not merely as a supply base but even as an operational base for the United States of America. The goods were therefore regarded as enemy property. *Minister of Marine* v. *Nasicka* (part cargo *ex* S.S. *Atlanta*), 21 May 1943 (not yet reported). *The same* v. *The same* (part cargo *ex* S.S. *Atlanta*) (No. 2), 21 May 1943 (not yet reported). Yet the cargoes were loaded in Yugoslavia in May 1940 and formally captured at Bordeaux in June 1941, both dates being antecedent to the outbreak of war between Italy and the United States. It is submitted that in these cases the proper course would have been to requisition the cargoes on the ground that although they were

Some observations may usefully be made here on the application of the doctrine of continuous voyage to conditional contraband. In the early days of the war against Germany many consignments would have escaped condemnation but for the existence of this doctrine, as shown by the British and, more especially, the French reports. From the German point of view, on the other hand, the doctrine is a highly inconvenient one, to say the least. It did not appear in the original *Prisenordnung* of 1909[1] in conformity with Article 35 of the Declaration of London, but was inserted by an Ordinance of 18 April 1915,[2] after the Allied Governments had refused to apply that article of the Declaration. The new *Prisenordnung*, however, exhibited the old lack of enthusiasm for the doctrine by providing, in a formula of some obscurity, that 'subject to reciprocity on the part of the enemy', articles are not considered as conditional contraband if they are to be discharged in a neutral port. The Dutch *Prijsreglement* is also hesitant, not, perhaps, unnaturally, concerning the application of the doctrine to conditional contraband. It provides merely that conditional contraband has an enemy destination if it is consigned to the enemy forces.[3] It is difficult to avoid the feeling that, in these days, the controversy is somewhat unreal.

17. *Blockade.* Broadly speaking, the law of contraband only prevents the import into enemy territory of those items which are included in the contraband list. When it was desired to apply more stringent measures and to stop all imports to, and exports from, enemy territory, recourse was traditionally had to the system of blockade. The conception of blockade, as developed most thoroughly by Lord Stowell and in the American Civil War, was based on the idea of the physical presence of the blockading force off the blockaded coast. However, the experience of the First World War was to show the relative unimportance and indeed the impossibility, under modern conditions, of the traditional form of blockade.[4] Nevertheless, all the new Prize Codes, with the exception of that of Holland, contain

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innocent at both the date of loading and that of the capture, they had become contraband of war by the time of the hearing. The doctrine of continuous voyage could be invoked to establish the presumption that the goods were destined to the enemy's armed forces.

[1] *RGB.* (1914), p. 275.

[2] Ibid. (1915), p. 227.

[3] *Prijsreglement*, Art. 62 (2). The Norwegian Prize Law of 1947, Art. 2, admits the doctrine of continuous voyage, and makes no distinction at all between absolute and conditional contraband.

[4] Verzijl, pp. 932–3, gives particulars of ten formal blockades which were proclaimed between August 1914 and September 1916. In addition, there was the pacific blockade of Greece of December 1916: ibid., p. 950.

provisions on the subject.[1] On the whole, these rules do not differ substantially from those contained in the legislation of the First World War. The main difference of opinion continues to be over the application of the doctrine of continuous voyage to blockade, a practice admitted by England,[2] France,[3] and now by Japan,[4] but not by Germany or Italy.[5]

The most important instance of formal blockade during the period of the Second World War occurred in December 1939 when the Soviet Government announced a blockade of the Finnish coast and adjoining islands (except the Aaland Islands unless the latter were used for war purposes).[6] Doubts were thrown by the Finnish Government on the validity of the blockade on two counts: in the first instance the Russian Government had earlier denied the existence of a formal state of war between Russia and Finland. Secondly, the blockade itself was said to be not effective within the meaning of the Declaration of Paris.[7] However, the termination of the first Russo-Finnish war prevented the issue from being put to the test either in a prize court or through the diplomatic channel.

The two principal European belligerents adopted measures similar to those which they had respectively employed in the First World War in order to cut off all their enemies' sea-borne trade. They were both associated in these measures by their Allies, though to varying degrees. Both sides based their measures, which in fact operated so as to nullify the provisions of the Declaration of Paris, on the doctrine of reprisals. The legality of this practice had been the subject of considerable discussion during and after the First World War.[8] No new developments in this respect took place during the Second World War.[9]

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[1] German *Prisenordnung*, Arts. 44–52; Italian Laws of War, Arts. 168–78; Japanese Navy Law, Arts. 34–54, of which Arts. 46 and 53 were amended upon the Japanese entry into the war in 1941; French *Instructions*, Arts. 74–85. Under the Norwegian Prize Law of 1947, Art. 1 (*a*), a ship can be condemned for breach of a blockade established by Norway or a state allied to Norway.

[2] Under the Maritime Rights Order in Council of 1916.

[3] *Instructions*, Art. 85.

[4] Navy Law, new Art. 53.

[5] Laws of War, Art. 178; this is, however, contrary to the rule in force during the First World War: see Hackworth, vol. vii, p. 121. Cf. Declaration of London, Art. 19.

[6] *B.I.N.* 16 (1939), p. 1426. The Aaland Islands were neutralized by the Statute of 20 October 1921.

[7] Ibid., p. 1389. See also letter dated 27 February 1940 of the Finnish Delegate to the League of Nations concerning the methods of warfare employed by the U.S.S.R.: League of Nations, *Official Journal*, 1940, p. 21: 'At the very outset of the aggression . . . the U.S.S.R. declared a blockade of the whole Finnish coast. . . . But she can have no justification for such a measure having previously declared that she was not in a state of war with Finland, and still maintaining the same attitude. The blockade must also be regarded as illicit because the U.S.S.R. is not in a position to impose it and keep it effective as provided in the Declaration of Paris of 1856. This must be attributed to the wide extent of the blockaded region, and to the fact that Finland is able, thanks to her coastal batteries, her warships, her air force and her defensive mines, to hamper—as she has already done in many cases—the effective action of the naval forces of the U.S.S.R. along the coast of Finland.'

[8] See in particular Verzijl, pp. 585–621, 948–9; Garner, pp. 630–6; Colombos, pp. 240–56.

[9] Many neutral states protested to the British and French Governments at their reprisals Orders of November 1939, but the disputes did not reach serious proportions. It may be doubted

The British 'Order in Council framing reprisals for restricting further the commerce of Germany' of 27 November 1939, and the analogous French Decree[1] provided that every merchant vessel which sailed from an enemy port, including any port in territory under enemy occupation or control, after 4 December 1939, might be required to discharge in a British or Allied port any goods on board laden in such enemy port. Every merchant vessel which sailed from a port other than an enemy port after the same date, having on board goods which were of enemy origin or were enemy property, might also be required to discharge such goods in a British or Allied port. Goods discharged in a British port were to be placed in the custody of the Marshal of the Prize Court to be detained or sold under the direction of the Court or requisitioned by the Crown. After the conclusion of peace any such goods or the proceeds of sale thereof were to be dealt with in such manner as the Court might in the circumstances deem just. Power was given to the Court to order earlier payment out in certain circumstances. This Order is similar in its effect to the Retaliatory Order of 11 March 1915,[2] except that, unlike the latter, which expressly excluded goods which were contraband of war from the treatment it prescribed, the new Order is silent in the matter of contraband. The difference is not, however, one of substance. Neither Order affected the liability of any vessel or goods to capture or condemnation independently of it. In 1921 it was held that in view of this stipulation the doctrine of infection would operate so as to condemn non-contraband goods belonging to a person who owned contraband goods on the same vessel, such non-contraband goods having previously been detained under the Order of 1915.[3] The modern extension of the contraband lists, by increasing the number of goods liable to condemnation as contraband, has reduced the relative importance of the doctrine of infection. The Order of 1939 is therefore unlikely to have imposed in practice any new burden, which did not exist before its passing, upon neutrals in respect of the carriage of

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if these protests had any real substance, because most of the states concerned had been Allied or Associated Powers in the First World War, and therefore must be taken to have acquiesced in the similar measures enforced then. See also Sandiford, 'Diritto di Preda e Diritto di Rappresaglia', in *Diritto Marittimo*, February 1940.

[1] *S.R. & O.* (1939) No. 1709. For the equivalent French Decree see *J.O.* 28 November 1939, pp. 13463/4. The British Order did not apply to South Africa, where special enactment was necessary. This was contained in Proclamation No. 3 of 1940, *Government Gazette*, 5 January 1940, as amended by Proclamation No. 32 of 1940, ibid., 16 February 1940. This amendment, not found in other parts of the British Commonwealth, extended the definition of 'enemy persons' to include persons on the Statutory List. See also *The Kanto Maru*, [1942] *South African Law Reports* (Natal Provincial Division), 311.

[2] *S.R. & O.* (1915), No. 206.

[3] *The Lapland* (1921), in Hull's *Digest of Cases*, p. 93. For the few instances of the use of the doctrine of infection in the Second World War see *The Grootekerk* (1941), *Lloyd's List*, 21 March; *The Hakozaki Maru* (1943), ibid., 14 May; *Various Remittances ex Mails* (1945), ibid., 14 June and 27 July.

non-contraband goods to enemy ports except in isolated cases. Similar treatment was extended to aircraft and goods carried therein by Order in Council of July 1940.[1]

These measures, as they applied to ships and their cargoes but not to aircraft and their cargoes, were greatly strengthened by the Order in Council of 31 July 1940, 'regulating a system of passes for approved cargoes and ships'.[2] This Order substituted condemnation for the detention previously ordered for goods of enemy origin or ownership, thus treating them on the same footing as contraband of war. Carrying the analogy of contraband a stage farther, it proceeded to order the condemnation of ships carrying contraband or goods of enemy origin or ownership in respect of such carriage. In this way it achieved an effect similar to that accomplished in the First World War by the Order of 16 February 1917.[3] These three Orders, which were in due course extended to all the other enemies of Great Britain,[4] were accompanied by non-legal measures such as the withdrawal of British facilities from ships and shipping lines which refused to enter into satisfactory arrangements with the British Government.

18. *Navicerts.* The Order of July 1940 was of great importance for another reason. It completely changed the rules for establishing the existence of contraband or the enemy origin or ownership of ships or cargoes, by creating rebuttable presumptions of such taint where the ship or goods were not covered by the appropriate navicert, definitions and conditions of which were contained in the Order. These new rules, it is submitted, are of a procedural character. In this respect they are similar to those introduced by the Declaration of London (No. 2) Order of 1914,[5] the effect of which was considered by Sir Samuel Evans in *The Kim*.[6] Their inclusion

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[1] *S.R. & O.* (1940), No. 1324. [2] Ibid., No. 1436. [3] Ibid. (1917), No. 163.

[4] In *The Constantinos* (1916), 2 *B. & C.P.C.* 140, Mr. Justice Cator of the British Prize Court for Egypt said: 'Reprisals, though perfectly legitimate as a form of punishment for breaches of international law, must always be treated as exceptional methods of warfare, and Orders for their enforcement must be construed somewhat strictly. It may be open to question whether an enemy against whom no charge is brought can be made to suffer for the inhumanity of its ally. . . .' This judgment was followed by the Order of 10 January 1917 (*S.R. & O.*, No. 6). In the Second World War the British authorities impliedly rejected the suggestion contained in the last sentence of this judgment and did regard the association of the various satellite countries with Germany and Japan as implying that the country concerned 'has thereby made herself a party to the method of waging war adopted by Germany and will share in any advantages derived therefrom'. See Orders in Council of 11 June 1940 (Italian commerce), *S.R. & O.* (1940), No. 979; 12 December 1941 (Japanese commerce), ibid. (1941), No. 2136; 22 January 1942 (commerce of Finland, Hungary, Roumania, and Bulgaria), ibid. (1942), No. 98; and 5 March 1942 (commerce of Thailand), ibid., No. 482.

[5] Ibid. (1914), No. 1614.

[6] (1915), 1 *B. & C.P.C.* 405, at p. 484: 'the only change . . . which the Order purported to make, was in the nature of alteration of practice as to evidence—namely by adding certain presumptions to those contained in Article 34 of the Declaration of London—and all these presumptions, whether set up in the interest of the captor or against him, are rebuttable. The Order proclaimed . . . how in practice, as matters of evidence and proof, cargoes . . . would be dealt with.'

in what is a stringent retaliatory Order is liable to obscure this fact. It has been pointed out that, 'although on general grounds it may be less easy in consequence of the Order in Council to regard a navicert as a mere facility which it is within the absolute discretion of the belligerents to grant or withhold, yet from a formal and legal point of view the Order does not, in this respect, effect any substantial alteration in the pre-existing situation'.[1] There is much to support this view in the decisions and dicta of the various prize courts which have since become available and which will be discussed presently. It is doubtful whether the doctrine of retaliation constitutes a proper basis of the Order. For that doctrine implies public discussion of its validity, and consequently public doubt, which it was the express purpose of the Order to remove. A more adequate foundation seems to be the inherent right of every state to issue legislation governing the procedure of its own prize courts.

There is another aspect of the 'compulsory' navicert Order which makes it less revolutionary than appears at first sight. There is no principle of international law to prevent a belligerent Power from attempting to regulate neutral trade with his enemy by a system of passes. This, indeed, was a regular feature of prize law before 1856, when it was based rather on particular and individual treaties than on general conventions.[2] The Order of 1940 does no more than modernize this practice. By providing not for absolute presumptions *juris et de jure* but for rebuttable presumptions to be applied in the absence of navicerts, presumptions which in fact are not necessarily displaced even where a navicert has been issued,[3] it imposes no undue burdens upon neutral traders and actually introduces greater certainty than was possible under the original form of navicert system, dependent as it was upon the goodwill and voluntary co-operation of neutral governments and traders. In fact, under the 'voluntary' navicert system, the 'offence' of a neutral trader in accepting a navicert *vis-à-vis* the opposing belligerent appears greater than under the 'compulsory' navicert system. When navicerts are voluntary the degree of voluntary co-operation with a belligerent which is demanded of the neutral implies unneutral service on his part towards the other belligerent, to whom corresponding rights are automatically given. When navicerts became compulsory, the neutral had no choice and the opposing belligerent was not justified in drawing irrebuttable conclusions unfavourable to the neutral in respect of the carriage of goods covered by a navicert to neutral territory.

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[1] Fitzmaurice, 'Some Aspects of Modern Contraband Control and the "Laws of Prize" ', in *B.Y.* 22 (1945), p. 73, at p. 89.

[2] There are many decisions in this matter from the old wars: see, for example, *The Vryheid* (*No. 1*) (1778); Hay and Marriott, *Reports*, 188; 1 *E.P.C.* 13. Some earlier examples from the old Scottish Prize Court can be found in Morison's *Dictionary of Decisions*: thus in *The Castle of Riga* (1667), M. 11860, by a treaty with Sweden 'if any Swedish ship have a pass from the King's Council . . . she shall not be questioned. . . . By the said Treaty it is agreed that the said passes shall expressly contain that the ship and the whole goods belonging to the subjects of Sweden contained no contraband goods, and that upon oath taken at the obtaining of the pass.' Out of 57 decisions rendered in the period 1558–1805, no less than 14 deal with passes granted in virtue of specific treaties: see Rowson, 'Note on Scottish Prize Law', in *L.Q.R.* 62 (1946), p. 132.

[3] See *The Monte Alberta* (1944), *Lloyd's List*, 22 December, where the whole cargo was covered by navicerts, but tins which comprised it were found to have false bottoms containing platinum, 'a material highly interesting to the enemy'. The cargo was condemned.

Some support for this view is seen in the sporadic decisions of the various prize courts concerning navicerts and analogous documents. These decisions were all rendered during the Second World War, for although navicerts were first introduced in 1916 there appear to be no instances reported arising out of the First World War in which they were an element in the case. The relevant jurisprudence of the Second World War is, however, somewhat disjointed. The law on the matter is still in an early stage of development. In the Judicial Committee of the Privy Council two cases have been decided where cargoes of conditional contraband were not covered by navicerts. In each case there were other grounds for suspicion, and as these other grounds were not displaced by the claimants the cargoes were condemned. Absence or refusal of a navicert was never the sole factor. The effect of such absence was well expressed by Lord Wright in *The Monte Contes*.[1] He said:

> 'It is a further matter of adverse suspicion that there was no navicert for the goods. This document would normally be attached to the manifest, if there had been a manifest, and even if it is not obligatory in the case of a coasting voyage . . . to procure it would at least be a natural and ordinary precaution.'

In *The Sidi Ifni*[2] the absence of a navicert was again regarded as affording a reasonable ground for suspicion.

These two cases discuss the situation where no navicert had been sought, despite the existence of the so-called 'compulsory' navicert Order in Council of 31 July 1940. The converse proposition, that one had been refused, arose in *The Almirante-Alexandrino*,[3] heard by the *Conseil des Prises*. Before the 'compulsory' navicert Order, a cargo of conditional contraband consigned to a Swiss firm through French territory had been refused a navicert by the Allied authorities at the neutral port of origin because of the suspect character of the *consignor* firm. A French Admiralty instruction of 3 April 1940, quoted by the *Commissaire du Gouvernement*, defined a navicert as a certificate issued in the country where the cargo originated and attesting, on the basis of information then available, to its non-enemy destination. 'The use of a navicert is never obligatory. An exporter is free to despatch goods from a neutral country without having received a French or British navicert. If he does so he only foregoes, to

[1] (1943), *Ll.P.C.* (2nd), 147.

[2] (1945), ibid. 200.

[3] (1945), not yet reported; similarly *The Mount Taurus* (1946), not yet reported.

his own risk and peril, facilities which the use of this system of control would make available to him.' Therefore, when other evidence established the innocent destination of the cargo, the refusal of the navicert was not regarded as sufficient to displace the evidence of innocence. The actual decision of the *Conseil* releasing the goods contains the following preambles:

> 'That Migros of Zurich, to whom the cargo was documented, had before despatch demanded a navicert which had been refused, after enquiry, by the Allied authorities; that the refusal of a navicert, even if it deprives the owners or consignees during the voyage of facilities which they were not obliged to solicit and obtain, does not in itself create a presumption of ultimate enemy destination, and leaves the burden of proof as to this on the captors; that the evidence shows that the navicert was refused because of the suspect character of the vendor, and suspicions attaching to the vendor are insufficient to establish ultimate enemy destination.'

The *Conseil* did take the view, however, that the fact that a navicert had been refused provided a reasonable ground for seizure by the French authorities, and therefore disentitled the successful claimant to indemnities.

On the basis of the information available at the time of writing, it seems that German prize courts were not faced with the problem of a cargo navicert as were the British and French courts. They did, however, analyse the British blockade system in a case where a ship's warrant was included among the ship's papers. The *Ole Wegger*[1] was one of a number of Norwegian whaling vessels which, contrary to the instructions of their owners, had placed themselves under the control of the legitimate Norwegian Government in London, and had been condemned for having rendered assistance to the enemy by having placed themselves under the control of the enemy Government.[2] Condemnation on this ground would have been justified. But the Norwegian shipowners—in occupied Norway—appealed to the *Oberprisenhof* on the ground that the ships were not of enemy ownership and the cargoes, consigned to South America, not contraband. The ship's papers were equivocal as to the cargo, which was therefore presumed to be of enemy character under the *Prisenordnung*, Article 8 (ii). The *Oberprisenhof* rejected the appeal on the ground that the vessels were actually under the control of the British Government. Proof of this was found in the presence on board of a ship's warrant issued by the British Ministry of Shipping, as envisaged in the Order in Council of 31 July 1940. The judgment contains a lengthy and interesting account of the British blockade system as seen through German eyes, and concludes that the control exercised by means of ship's warrants has as its aim not the prevention by military means of single voyages but the systematic subordination of the whole undertaking of a neutral shipowner to British supervision so as to render the direct application of military force in each individual case unnecessary. 'A ship which is subjected to such control thereby directly furthers and facilitates the military and economic war effort of the enemy Government, and, save in exceptional circumstances in individual cases, is therefore guilty of hostile assistance.'[1] This reservation of exceptional circumstances, which implies, as the British and French courts have each implied, that the presence or absence of a navicert does not raise irrebuttable presumptions, seems to mitigate the apparent severity of the German doctrine, as expressed in the *Prisenordnung* and various public announcements issued during the war on behalf of the German Government, that ships carrying navicerts and analogous documents would automatically be condemned for hostile assistance. If this were so, then there is fundamental harmony in this matter between the three systems of prize law, and the way would be opened to a more satisfactory regulation of legitimate neutral trade in the future than has existed in the two World Wars.[2]

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[1] *The Ole Wegger and Other Vessels*, decided on 19 December 1941.

[2] *Prisenordnung*, Art. 38 (ii).

19. *The German system.* It is of the essence of the British system of prize law that it is open to any person who feels aggrieved by the exercise of belligerent rights at sea to bring his complaint before the prize court,[3] a protection which was extended to the régime established by the Reprisals Orders even although the detention which they first ordered was not strictly a matter of prize. But the German system is entirely different. Already in the First World War the *Oberprisenhof* drew a distinction between 'acts of war' (*Kriegsmassregel*) carried out by German naval forces prior to seizure, and events occurring thereafter, holding that only the latter were justiciable in the prize court.[4] The full force of this distinction is felt in the peculiar German rules as to indemnities for destruction and other improper actions by the captors. It is now clear, however, from German documents which have come into the possession of the Allies

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[1] Decided on 18 December 1942.

[2] The matter was not raised in the Italian Prize Tribunal, although the absence of a navicert was relevant in a case heard before the civil Tribunal of Genoa concerning the interpretation of a charter-party. The Court said: 'The system employed by the Allied naval authorities to cut off German supplies during the present conflict consists, as is well known, in the examination not merely of the ship's papers but also of the cargo. In order to simplify this examination, without, however, preventing entirely some detention of the ship, there has been instituted the navicert, a document issued in the country of origin of the goods by the authorities of the States which have arrogated to themselves the right of visit, and it has to accompany the cargo through the entire voyage. The defendant has no reason to complain if his ship, not having been furnished with a safe-conduct of this nature, was detained at Malta for five days.' *The Gloriastella* (1940), *Diritto Marittimo* 468, at p. 471. This view of the nature of a navicert, and of the effect of the absence of one, is not out of harmony with the principles followed by the prize courts of the other belligerents.

[3] Cf. Lord Parker's dictum in *The Zamora* (1916), 2 *B. & C.P.C.* 1, at p. 13. For the institution of causes in the prize court see Prize Court Rules, 1939, O. II, rr. 1–3; and cf. *The Prins Knud* (1941), *Ll.P.C.* (2nd), 57.

[4] *The Bertha Elizabeth* (1915), *Jurisprudence Allemande*, 45 and 47; *The Geertruida* (1917), ibid. 228; *The Eemland & Gasterland* (1917), ibid. 296.

since the unconditional surrender of Germany, that this distinction was of far deeper significance, and in fact formed the basis of the German system of naval warfare in general and of blockade in particular.[1] Thus we find that the German Admiralty recognized a distinction between 'war according to prize law' and war not according to prize law, in other words, the sinking without warning of neutral ships alleged or believed to be carrying contraband to England. What the German Admiralty euphemistically called 'the intensification of naval warfare' meant a reduction in the categories of cargoes or the number of countries whose ships were to be treated 'according to prize law', with a corresponding increase in those to be sunk without warning. From the German point of view that system had an additional advantage, correspondingly harmful to legitimate neutral interests, in that the relevant instructions could be issued in secret as operational orders to the German fleet without necessarily requiring the promulgation of formal decrees giving notice to the world at large. The German Admiralty and the German prize courts, which evolved the doctrine of the non-justiciability of acts of war, and their subtle distinction between justiciable *Aufbringung* (seizure) and non-justiciable *Einbringung* (deviation into port), must be deemed to share the responsibility for this method of waging naval war. It may be natural, though not excusable, for a fighting service to seek to free itself from the fetters which the law imposes on its freedom of action, especially when vital interests of the state are at stake. But the position of prize courts is different. Their purpose is to protect the legitimate interests of persons injured in the conduct of naval operations. This is a protection to be extended to friend and foe alike. Undoubtedly, the basic question before the prize court is prize or no prize. At the same time it has also in the past provided a tribunal for disciplinary or quasi-disciplinary process in face of complaint concerning the exercise of belligerent rights.[2] Both these functions originated in the days of privateering. Its abolition and the consequent substitution of the state for the individual captors have not affected fundamentally these functions of the prize court.

The system which Germany actually adopted in the Second World War was the same as that used in the First. It is succinctly described in the Judgment of the International Military Tribunal for the trial of German major war criminals.[3] It was based upon the creation of so-called operational zones within which neutral ships, and *a fortiori* enemy ships, were to be sunk without warning. In this warfare the submarine and air arms were exploited to the full, in violation of the Naval Protocol of 1936.[1] The Nuremberg Tribunal was not prepared to find the two German admirals, Raeder and Doenitz, guilty for their conduct of submarine warfare against British armed merchant ships owing to the fact that already in 1938 the British Admiralty had integrated 'merchant vessels into the warning network of naval intelligence'.[2] It left no doubt as to its views concerning the essential illegality of this way of waging war. As to prize courts, their activity in Germany during the two World Wars once more raises the question whether—as a matter of future development—the prize courts should not be purely judicial tribunals as they are in the British Empire and the United States. However, this is a problem which requires a more thorough examination than is possible here.[3]

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[1] The operational use of this conception is clearly in evidence in the nine volumes of *Fuehrer Conferences on matters dealing with the German Navy, 1939–1945*, containing the minutes of all important conferences between Hitler and high-ranking naval officers during the war years, prepared by the United States Navy. See also Ambrosius, 'Die völkerrechtlichen Grundlagen der deutschen Handelskriegführung 1939/40', in *Nauticus*, 24 (1941), pp. 60–75, for an elaborate apologia for the German conduct of maritime warfare. For a modern Italian view see Sandiford, *I Tre Blocchi dell' Inghilterra* (1942), particularly from p. 65 onwards.

[2] Cf. Holdsworth, *History of English Law*, vol. i (6th ed.), pp. 562 ff.

[3] *Parl. Papers*, Misc. No. 12 [1946], Cmd. 6964, pp. 108–9.

VI. *The formal right of prize*

20. *Visit and search. Captor's duties.* All the new prize codes admit the right of deviation for the purposes of visit and search, and thus reaffirm the practice rendered essential by modern conditions and developed during the First World War.[4] Only few cases bearing on the subject were decided in connexion with the Second World War. The question was discussed in *The Mim*,[5] where Hodson J., following *The Bernisse*[6] and *The Regina d'Italia*,[7] stated his view of the law to be that in the absence of suspicion a ship must be allowed to proceed after she has been visited. If she was detained by mistake or for some ulterior reason, unconnected with search,

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[1] *Parl. Papers*, Treaty Series No. 29 [1936], Cmd. 5302.

[2] Judgment, pp. 108, 109, 112.

[3] The proposed International Prize Court would have consisted only of 'lawyers whose competence in matters of international maritime law is well known and who enjoy the highest moral reputation': Hague Convention No. XII, Art. 10. Under Art. 18, naval officers of high rank could be appointed as assessors in certain circumstances 'avec voix consultative'. It may also be observed that whereas the German Reich has always had special tribunals to hear prize cases (Huberich and King, *The Prize Code of the German Empire*, p. xii), other countries have not been consistent. Thus in 1897 jurisdiction in prize in Greece was given to the ordinary tribunals, although in 1913 it was restored to an administrative tribunal (Séfériadès, 'Les Tribunaux de Prises en Grèce', in *Revue Générale de Droit International public* (Paris), 23 (1916), p. 31. In France, where the *Conseil des Prises* is the administrative prize court *par excellence*, there have been many fluctuations and controversies concerning the tribunal to which appeal lies—Parliament, the *Conseil d'État*, and the Court of Cassation all having, at various times, exercised appellate jurisdiction: see De Pistoye and Duverdy, *Traité des Prises Maritimes*, vol. ii (1859), pp. 140 ff.

[4] German *Prisenordnung*, Arts. 60–3; Italian Laws of War, Art. 182; Dutch *Prijsreglement*, Art. 29; French *Instructions*, Art. 109, and Decree of 2 September 1939; Japanese Navy Law, Art. 20 (as amended). See also Hackworth, vol. vii, p. 19, for a protest by the United States Government of 14 December 1939 which quoted the U.S. Neutrality Act, and the British reply advising that any good claims should be pursued in the prize court; and Sandiford, 'Diritto di Preda e Controllo Navale', in *Rivista Marittima*, December 1940.

[5] (1947), *Ll.P.C.* (2nd), 231.

[6] (1920), 3 *B. & C.P.C.* 771.

[7] (1919), 9 *Ll.P.C.* 265 n.

the Crown could not rely on the belligerent right of visit and search as an answer to the plaintiff's claim for damages.[1] If the visit established reasonable suspicion, the belligerent right of visit and search would be of little value if it did not involve the sending of the vessel to a definite port for examination, for search in those days could not take place at sea. He also declined to accept a contention that, after a prize crew had been placed on board, the ship's officers became agents of the Crown. The Italian Tribunal also considered the right of the captor to proceed to the examination of cargo at a place other than that where the ship was first stopped, and held that this procedure was in accordance with international law.[2]

The enemy's policy of scuttling his ships so as to avoid their capture by the British Navy led to a full examination of the legal situation before the Sierra Leone Prize Court in *The Indo-Chinois*.[3] Attempted scuttling was found to be a forcible resistance to visit and search and, as such, sufficient to support condemnation. In *The Klaus Schoke*,[4] the German vessel was scuttled by her crew and sank before a prize crew could be placed on board. Lord Merriman thought that in these circumstances to make a declaration that the scuttled ship was prize was something new, and he refused at first to make the order. In later proceedings some of her papers were brought into court as a token. The eventual order condemning the ship declared that it was impossible to bring her into port for adjudication as she was sunk—lost by the action of the German crew before the prize crew could board her. The point of this case is of interest. It is obviously difficult for the court to condemn something which has not been brought in for adjudication. On the other hand, some kind of decree is necessary so as to provide an answer to possible claims relating to the ship and her cargo.

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[1] This decision also indicates here that the view expressed by the late Professor Higgins that 'every time a vessel is stopped and sent in for search the Prize Court obtains jurisdiction, and that aggrieved persons can apply to it for redress' is correct. See 'Visit, Search, and Detention' in *B.Y.* 7 (1926), p. 43, at p. 48, following the decision of the Court of Appeal in *Netherlands American Steamship Navigation Company* v. *H.M. Procurator-General*, [1926] 1 K.B. 84 (on appeal from the War Compensation Court established under the Indemnity Act, 1920, 10 & 11 Geo. 5, c. 48). It is now clear that such jurisdiction commences from the time the vessel is stopped. The procedure for those who wish to sue the Crown has recently been simplified by the Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44, which applies to proceedings in the prize court.

[2] *Minister of Marine* v. *Commercial Bank of Greece and others* (*re* a cheque taken from mailbags on board S.S. *Attiki*) 18 June 1943, not yet reported. The capture was effected not in port but in the censorship offices in Rome, whither the mailbags had been taken for a more thorough examination than was possible at the port. The Tribunal pointed out that it was to the advantage of neutrals that the formal capture should be preceded by a thorough examination in this way, even if it involved a degree of deviation and delay, rather than that the full investigation should be carried out by the prize court. But the question of the liability of the captor for undue delay prior to release, or for negligence in any way, was not considered.

[3] (1941), *Ll.P.C.* (2nd), 72—a 'Vichy' French ship, regarded as neutral.

[4] (1942), *Lloyd's List*, 20 February and 13 July. It is quite clear that very great caution is necessary in drawing up such an order because of its effect on neutral claimants and the possibility of unforeseen liability falling on the captor unless there is clear condemnation. In *The Odenwald* (1947), *American Maritime Cases* 666, before the Puerto Rico District Court, the judge pointed out that even if the master was authorized by the German Government to scuttle his ship, he had no right to sink her and ignore the rights of her Swiss mortgagee and of the owners of the cargo on board. For a recent decision on the absolute validity in foreign countries of a decision of a belligerent prize court see *The Janko* (1944), ibid. 639.

The correct form of order where an enemy prize has been sunk by the captor has also been judicially considered. In *The Olinda*[1] the learned President pointed out that an order declaring that 'the sinking of this enemy vessel together with her cargo was necessary' would be required. He added that it was advisable to prepare a schedule of the cargo so far as it was represented by the bills of lading and incorporate it in the order. This was done, and an order similar to that in *The Stoer*[2] was drawn up. It was stated that neutral cargo claimants would have the right to apply at a later date to set aside the order in so far as their interests were affected.

In the Italian Prize Tribunal, in *The Athinai*,[3] one of the questions was whether attempted flight to avoid capture was a ground for condemnation. The Tribunal, while not rejecting this argument, was able to hold that because of the flight the vessel had put herself in the position of a vessel on the high seas with knowledge of the existence of war (which *inter alia* was presumed absolutely because she was fitted with radio apparatus), and for this reason could not claim the exemption granted by Article 184 of the Laws of War to enemy vessels encountered at sea ignorant of the outbreak of hostilities.

21. *Requisition and seizure.* The correct treatment to be accorded to property belonging to countries in respect of which the precise belligerent status is not clear has occasioned a variety of decisions. The problem arises out of the peculiar nature of modern war-time coalitions in which not all the members of one are formally at war with all the members of the other. In *The Lawhill*,[4] the Cape Town Supreme Court properly ordered the requisition of a Finnish vessel at a time when Finland was an ally of Germany but was not at war with South Africa. It did not condemn the vessel as enemy property until after the outbreak of war between the two countries. The same procedure was followed in the case of the Thailand vessels *Suryo Thai Nawa*[5] and *Visut Kasatvi Nawa*.[6] In this instance

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[1] (1942), *Lloyd's List*, 20 February and 13 July.

[2] (1916), 5 *Ll.P.C.* 18.

[3] *Minister of Marine* v. *Hellenic Lines Ltd.*, 20 March 1942: *Boll.*, ii. 302. This decision accords with the view of international law as expressed by Professor Verzijl, at p. 1182. For comment on this case see Ciancarini in *Diritto Marittimo* (1942), p. 97.

[4] (1941), *South African Law Journal*, 59 (1942), p. 46; *Annual Digest*, 1938–40, p. 575 (requisition); (1942), *South African Law Journal*, 59 (1942), p. 262 (condemnation). But in London Lord Merriman expressed himself to be 'not happy' about this practice: *The Inginer N. Vlaspol* (1942), *Lloyd's List*, 13 July.

[5] (1941), *South African Law Journal*, 59 (1942), p. 148 (requisition); (1942), ibid., p. 153 (condemnation).

[6] (1941), ibid., p. 150 (requisition); (1942), ibid., p. 153 (condemnation). Each of these orders was subject to claims in respect of general average contribution, and for seamen's wages, being satisfied.

the decision to requisition is the more noteworthy because, according to government proclamations of 8 and 22 December 1941, Thailand was to be treated as a portion of Japan, a country with which South Africa was at war. On the other hand, the London Prize Court condemned two Thailand vessels which were regarded as being enemy vessels with effect from the date on which Thailand was proclaimed enemy-occupied territory for the purposes of the Trading with the Enemy Act, namely, 12 December 1941,[1] although war between Great Britain and Thailand does not seem to have broken out until 25 January 1942.[2]

In the case of Danish vessels, the Crown as a matter of policy declined to seek decrees of condemnation, and undertook to return these vessels to their owners after the war.[3] It was content to apply for their requisition. In Australia, in *The Astoria*,[4] this procedure was challenged on the ground that the prize court would only have jurisdiction if it could be established that a state of war existed between Great Britain and Denmark. The Sydney Prize Court rejected this contention so far as the application for requisition was concerned, for at the hearing of the suit for condemnation it would have to be proved whether the ship was a prize of war or not, and that would require proof of the degree of control exercised by Germany over Denmark. The order was granted on the undertaking to pay the appraised value of the vessel into court. The same attitude was adopted by the Natal Prize Court in *The Kalo*,[5] and by the Bombay Prize Court in *The Gudrun Maersk*.[6] In England this procedure was challenged, not by the owners, but by third parties claiming in respect of salvage services which they had rendered. In *The Prins Knud*[7] they issued a summons asking for an order that the Crown 'do forthwith proceed to adjudication in this cause instituted for the condemnation of the vessel'. In view of the declaration of policy concerning Danish vessels the President held that it would be wrong to compel the Crown to bring the case to adjudication and that the rights of the salvors, properly safeguarded, would be postponed for determination and satisfaction until the end of the war. His doubts whether action taken to requisition the vessel coupled with a disclaimer of the intention to seek condemnation was consistent with *The Zamora*,[8] were resolved by the Attorney-General, who pointed out that in *The*

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[1] *The Thep Satri Nawa* and *The Nang Suang Nawa* (1947), *Lloyd's List*, 11 February.

[2] *B.I.N.* 19 (1942), 124.

[3] For the text of the announcement by the Procurator-General see *Lloyd's List*, 4 May 1942.

[4] (1940), *Ll.P.C.* (2nd), 53.

[5] (1940), *Ll.P.C.* (2nd), 56; a fuller report will be found in [1940] *South African Law Reports* (Natal Provincial Division), 295.

[6] (1940), *Ll.P.C.* (2nd), 42; cf. also *The Chile* (1940), *Lloyd's List*, 15 October (Singapore Prize Court).

[7] (1941), *Ll.P.C.* (2nd), 57; on appeal (1942), ibid. 99.

[8] (1916), 2 *B. & C.P.C.* 1.

Zamora it was decided that there was to be no requisition merely by executive action. When the case was taken to appeal this ruling was not considered, by arrangement with the parties, although their Lordships 'thought it desirable' to restate the old principle that the captors must promptly bring the property in for adjudication; they were satisfied that the President was not casting any doubt upon it.[1] It is interesting to observe that Germany likewise did not regard Danish vessels as enemy vessels, and Danish waters were regarded as neutral waters in which the right of prize could not be exercised.[2]

A similar though not identical problem arose in connexion with Japanese property which was neutral at the date of seizure and which became enemy property before the proceedings arising out of the first seizure were completed. Here there was no question of any special status arising from the fact that Japan was at war with some but not all of the United Nations, as was the issue in the Finnish and Thailand ship cases. Japan was at the material times either neutral or an enemy of the capturing state. The first case is *The Kanto Maru*,[3] heard by the Natal Supreme Court in 1942. Goods consigned from Rio de Janeiro to Japan, two neutral places, had been seized at Durban in December 1940 under the Reprisals Order of 1939 as it applied in South Africa. Proceedings were commenced in the Durban Prize Court for their condemnation or alternatively for their sale and detention under the Reprisals Order, but in June 1941 the case was transferred to the Natal Prize Court and adjourned *sine die*, each side retaining the right to renew the proceedings on giving short notice. Subsequently, neither side took any steps to restore the case to the list. On 9 December 1941 the Natal Court ordered the appraisement and sale of the goods, which throughout had been in various warehouses, within and without the harbour precincts, always in the physical control of the customs authority which effected the original seizure and in the custody of the Marshal. After war broke out between Japan and South Africa, the cargo was re-seized as enemy property and a fresh writ issued. On this the Court condemned the cargo as good and lawful prize and as droits and perquisites of the Admiralty. It held that the question whether the first seizure was lawful or not was irrelevant because the Crown relied upon the second seizure, which it had the right to make, following *The Orteric*.[1] Furthermore, there was no juridical ground upon which it could be held that the second seizure was not competent because of the existence of the earlier process in relation to the same cargo and based upon an earlier seizure made at a time when the enemy subject was a neutral. *The Sado Maru*,[2] heard later in England, differed from *The Kanto Maru* in two material particulars: there was no formal adjournment of the original proceedings giving either side liberty to apply, and there was no formal second seizure. This vessel was stopped in September 1939 when her cargo, loaded before the war, was seized in prize and sold. The vessel herself was allowed to proceed. In 1942 the proceeds of the goods were condemned as being contraband destined for Germany, but all freight and charges earned in respect of the carriage thereof were retained by the Marshal, 'for whom it might concern'. Later, the Crown's application for the condemnation of this freight was opposed by the Controller appointed by the Board of Trade who sought to distribute it among the British creditors of the Japanese shipowners. In allowing the claim of the Crown the Court held that, although before the outbreak of war with Japan the Japanese shipowners might have been entitled to compensation in lieu of freight, that right was lost when Japan became a belligerent, upon which event the sums representing freight became liable to condemnation as good and lawful prize. The somewhat disquieting aspect of this part of the decision is the long delay which elapsed from the date of the original seizure and the condemnation of the goods, although it is possible that this delay was not the fault of the Crown.[3] One of the advantages of adopting the expedient of issuing a new writ is that it enables the question to be decided entirely on its merits, and that it avoids any confusion which is bound to follow from long-drawn-out proceedings.

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[1] And see the extraordinary case of *The Verbania* (1944), *Lloyd's List*, 25 May, where, using strong language to reaffirm the rule, Lord Merriman termed the Army authorities 'pirates' for taking possession of certain property at Port Said *ex* an enemy ship without a requisition order from a prize court. Nevertheless, the requirement of obtaining an order for requisition from the prize court seems to have been regarded as little more than a formality. Between the outbreak of the war in 1939 and the end of 1947 such orders had been obtained in the cases of 524 ships, of which 389 were subsequently condemned. Most of these ships have not been formally appraised, although in the case of each ship an undertaking providing for the payment into court of her value has been filed: see written answer by the Attorney-General in House of Commons, *Official Report*, vol. 445, cols. 534–5, 17 December 1947. For this reason it is impossible to make any estimate of the amount involved, a matter which might affect those interested in the distribution of the Naval Prize Fund (see *infra*, p. 214, n. 2). There is no reported case, other than those involving the Danish vessels, in which the application for an order to requisition has been a matter of controversy.

[2] Cf. *In re The Hansa* (1946), *Lloyd's List*, 10 May (in the London Prize Court).

[3] [1942] *South African Law Reports* (Natal Provincial Division), 311.

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[1] (1920), 3 *B. & C.P.C.* 578, at p. 583.

[2] (1946), *Ll.P.C.* (2nd), 224.

[3] Proceedings in the Prize Court in London seem to have been generally slow. The Attorney-General has stated that the average period that elapses between the issue of the writ on behalf of the Crown and the final decree of condemnation when no claim has been made by any other party has been 9·8 months in the case of ships, and 18·6 months in the case of cargoes or items of cargoes. He points out, however, that the Prize Court Rules provide that no ship or cargo shall be condemned in the absence of an appearance or claim until six months have elapsed from the service of the writ, unless it appears from the ship's papers that the ship or cargo is liable to condemnation: House of Commons, *Official Report*, vol. 445, written answers, cols. 534–5, 17 December 1947. As to the six-months rule, see *The Alwaki and other Vessels* (1940), *Ll.P.C.* (2nd), 43: and for the condemnation of a vessel, captured in a German port, where there was no evidence whether she was inward or outward bound, and no claim had been made within a year and a day, see *The Ernst L. M. Russ and Cargo* (1946), *Lloyd's List*, 26 June.

The only comparable case from the other prize courts is *The Leontios Teryazos*,[1] heard at Hamburg. This Greek neutral vessel was seized on 27 September 1940 at Bordeaux on the ground of unneutral service. It had been ascertained that she was under charter to the British Ministry of Food. Proceedings were still in progress when, on 7 April 1941, war broke out between Germany and Greece, upon which event the vessel was re-seized and new proceedings instituted on the simple ground that she was enemy property. The shipowner's claim that the second seizure could not be proceeded with while the first was pending was rejected by the Prize Court for reasons similar to those expressed in *The Kanto Maru*. The Court also relied upon British and French precedent. The problem did not arise in an acute form in Italy, where the Prize Tribunal, in holding that enemy character attaches from the date of the outbreak of war[2] regardless of the date of the seizure or the loading, seems to have adopted a somewhat formal attitude.

The British view that there must be no requisition merely by executive action is not universal. Thus the Italian Prize Tribunal declined to exercise jurisdiction where there was unopposed requisition by the state, on the ground that this was an administrative act and that the decree of the court was not needed as a document of title. However, by adding that it would adjudicate if there was a claim by an interested party, it approached the British view.[3] In the Union of South Africa, War Measure No. 7 of 1941[4] allowed the requisition, apparently without recourse to the prize court, of any ship registered in a country which had, on the authority of its government, detained any ship belonging to or chartered by any person resident in Allied territory, or which was registered in Allied territory, including the Union of South Africa. Pursuant to this Proclamation four French merchant ships which had been intercepted at sea and brought in to South African ports were requisitioned. But the most important exception to the practice of subjecting requisition of enemy or neutral ships to proceedings in prize is provided by the United States. Thus, while she was still neutral, the Idle Foreign Vessels Act of 1941[5] provided for the requisition, against just compensation to the owner, of all vessels to which it applied, whether belligerent, quasi-neutral (such as Danish vessels), or wholly neutral. After the entry of the United States into the war, enemy vessels so taken over came under the jurisdiction of the Alien Property Custodian and not of the prize court.[1]

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[1] Decided on 27 May 1941; an appeal was heard by the *Oberprisenhof* on 20 November 1942, but the proceedings of this are not available.

[2] Cf. *Minister of Marine* v. *New Zealand Loan and Mercantile Agency* (part cargo *ex* S.S. *Beatrice C.*), 4 July 1941: *Boll.* ii. 43. The precise date of the outbreak of war between Italy and any other country was fixed by a special decree in each case.

[3] *Minister of Marine* v. *A. Smith Associated Company* (*The Ulmus*), 18 July 1941: *Boll.* ii. 63.

[4] *Government Gazette*, Extraordinary No. 2858 of 15 February 1941; details in Hackworth, vol. vi, p. 651.

[5] 55 Stat. 242: detailed in Hackworth, vol. vii, p. 541, and Knauth, 'Prize Law Reconsidered', in *Columbia Law Review*, 46 (1946), p. 69, at pp. 88 ff.

VII. *Aircraft and Prize Law*

22. *Subjective contact with prize law.* There are two major points of contact between aircraft and prize law; a subjective, or active, one, and an objective, or passive, one. Subjectively, it is possible for aircraft to serve as the instrument by which belligerent rights against ships or against other aircraft are exercised. On the other hand, aircraft may be the object against which belligerent rights are exercised, whether by other aircraft or by ships or, indeed, by land forces. Of the two points of contact, the first presents fewer difficulties. The general tenor of the decisions of the British and German prize courts of the First World War firmly establishes the fundamental principle that a ship and her cargo seized in the course of maritime operations, as that term is understood in prize law, will be good and lawful prize, provided that the conditions of the substantive prize law are fulfilled, regardless of the manner in which the act of belligerency was effected.[2] Thus we find—not, it is true, directly to the point but suggestive of it—that the British Prize Court held in *The Königsberg*[3] that the pilots and observers of two aeroplanes belonging to the Royal Naval Air Service formed part of the crews of certain British warships and therefore qualified for a share of prize bounty consequent upon the destruction of an armed enemy ship at which they were present. Similarly, after the passing of the Naval Prize Act, 1918,[4] prize bounty was allowed to certain units of the Royal Air Force which formed part of the forces blockading the Dardanelles.[5] More important, for our immediate purposes, are two German decisions. The *Gelderland* was a Dutch vessel deviated by a German aeroplane off her course between Newcastle and Rotterdam to Zeebrugge (under German occupation) and there seized by the duly authorized representatives of the German Admiralty. The validity of seizure in this manner was upheld directly by the Hamburg *Prisenhof*[6] (although subsequently the vessel was released by the *Oberprisenhof*[7] on

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[1] *Annual Report*, Office of Alien Property Custodian, 11 March to 30 June 1942, Washington, p. 38.

[2] See, for example, the various cases in all prize courts regarding seizures on land. This principle is also affirmed, in a negative sense, in a case such as *The Anichab* (1919), 3 *B. & C.P.C.* 611 (Lord Sterndale), affirmed, on appeal, (1921) ibid. 993, where a capture of a ship on land, by land forces in the course of land operations, was held not to be maritime prize.

[3] (1917), *B. & C.P.C.* 135.

[4] 8 & 9 Geo. 5, c. 30, sect. 3 (2).

[5] *The Breslau* (1919), 8 *Ll.P.C.* 446.

[6] Verzijl, p. 308.

[7] (1918), *Entscheidungen des Oberprisengerichts in Berlin*, vol. ii, p. 333. The new *Prisenordnung*, Art. 2, does not exclude the exercise of the right of prize against ships by aircraft: see *The Roald Jarl*, decided by the Hamburg *Prisenhof* on 19 December 1940.

other grounds and, by implication, by the Belgian Prize Court).[1] Again, *The Agiena*,[2] a Dutch sailing-ship, was also arrested on the high seas by the action of a German aeroplane and, having been deviated to Zeebrugge, was subsequently condemned by the same Court for the carriage of contraband, the Court offering no comment upon the manner of her arrest. Nevertheless, in 1922 this principle did not meet with universal acceptance. The Report which accompanies the Hague Air Rules gave reasons why prize rights should not be exercised by or against aircraft generally.[3] The conference itself was unable to reach agreement over this problem. Thus France would have aircraft conform to the rules applicable to surface ships. This was also the view of the United States. Great Britain sought an analogy with submarines. Japan alone recognized the practical difficulty. Her delegates insisted that visit and search is a necessary preliminary to capture, and that unless an aircraft is physically capable of carrying it out, the recognition of the right of military aircraft to conduct operations against merchant vessels may lead to a recurrence of the excesses practised against enemy and neutral merchant vessels in the submarine campaign of the First World War. Italy accepted the British point of view.

In the legislation in force during the Second World War what has here been called the 'subjective contact' was specifically regulated in two only of the codes, the Italian[4] and the Dutch,[5] although the Italian rule does not seem to have been considered in *The Kriti*,[6] for the report does not state whether the destruction of this Greek privately owned merchant vessel by an Italian aircraft conformed to the requirements of the Laws of War. However, if the classification here suggested is correct, and if the essential legitimacy of the method of the exercise of belligerent rights at sea depends not on the subject but on the object (including its nature, its situation, and the surrounding circumstances), then the exercise of belligerent rights against ships by aircraft is not in itself contrary to the principles of international law.

23. *Objective contact with prize law.* In connexion with the application to aircraft of the objective right of prize, that is to say, its exercise against aircraft, the problem of classification is much more complicated. This is

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[1] *The Gelderland*: *Moniteur Belge*, 30 October 1919; Verzijl, p. 1292: 'attendu que le steamer *Gelderland* battant pavillon néerlandais a été arrêté . . . en haute mer par un avion allemand. . . .'

[2] (1917): mentioned in Verzijl, p. 308; reported in Grotius, *Annuaire International*, 1919–20, p. 83: 'Der . . . hollandische Segler . . . ist . . . in der Nordsee von einem deutschen Flugzeug angehalten, zur näheren Untersuchung nach Zeebrugge eingebracht. . . .'

[3] Comment on Art. 49.

[4] Laws of War, Art. 233: Aircraft must observe the stipulations of the law relating to maritime war, in their belligerent operations against ships, and aircraft which for any reason, including their construction, are unable to do so are forbidden to visit and capture merchant ships.

[5] *Prijsreglement*, Arts. 39–40, applying to aircraft the rules applicable to the exercise of belligerent rights by ships.

[6] *Minister of Marine* v. *S.A. della Costiere greca*, 22 January 1943: *Boll.* ii. 445.

due to the radical difference in the treatment of private property under international law according to whether the matter falls to be governed by the rules of warfare on land or at sea. Because in many respects the technical problems of air navigation bear a certain superficial resemblance to the problems of maritime navigation, or at all events a closer resemblance than they do to similar problems on land, it does not follow that the legal regulation of belligerent rights against aircraft and even less against goods carried in them should be based on the analogy of the exercise of belligerent rights at sea.[1] The difference in the treatment of property on land and at sea is fundamental. On land, the objective is primarily to force a military decision. At sea, the aim is to destroy the enemy's commerce, an objective best attained by the capture and confiscation of private property.[2] Therefore, while enemy and neutral private property at sea can be condemned as prize without any compensation whatsoever, such treatment is expressly forbidden on land,[3] where requisitions must be paid for[4] and where property requisitioned must be restored at the conclusion of peace.[5]

The Hague Air Rules chose the maritime analogy. Yet they applied the rules of land warfare to neutral private aircraft found upon entry into the enemy's jurisdiction by a belligerent occupying force. The Air Rules would have allowed these to be requisitioned, subject to payment of full compensation.[6] At the Hague Conference, however, most of the delegations did not feel able to reject the principle that aircraft should be allowed to exercise the belligerent right of visit and search, followed by capture where necessary, for the repression of enemy commerce in an aircraft in cases where such action is permissible. According to the Draft Rules, private aircraft are liable to visit and search and to capture by belligerent military aircraft,[7] while neutral public non-military aircraft, other than those which are to be treated as private aircraft, i.e. aircraft belonging to state-owned lines for commercial purposes, are subject only to visit for the purpose of verification of their papers.[8] This assimilation of certain neutral public non-military aircraft to private aircraft, which foreshadows the existence of nationalization, overlooks, as we have indicated in connexion with the analogous problems of state-owned ships, that for a neutral state to permit its own commercial aircraft to engage in activities which would render them liable to condemnation if they were private property is a breach of neutrality against which a belligerent should be allowed to protect himself without reference to a prize court. The Hague Air Rules recognize ten general grounds for condemnation, all of them found in maritime law.[1] It is submitted that experience since 1922, and particularly that of the Second World War, has demonstrated that the application of prize law to aircraft is based on a false classification, warranted neither by the physical characteristics of commercial aircraft nor by their limited capabilities as international carriers.[2]

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[1] R. Y. Jennings, in his 'International Civil Aviation and the Law', in *B.Y.* 22 (1945), p. 191, at p. 205, referring to cabotage, points out that as so often happens when air law seeks an analogy in maritime law, the analogy is misleading.

[2] E.g. Wheaton's *International Law*, 7th ed. by Keith, vol. ii (1944), p. 290.

[3] Fourth Hague Convention of 1907 concerning the laws and customs of war on land, Regulation 46.

[4] Ibid., Regulation 52.

[5] Ibid., Regulation 53.

[6] Hague Air Rules, Art. 31; and compare Art. 32 relating to enemy public aircraft, subject to confiscation without prize proceedings.

[7] Ibid., Art. 49.

[8] Ibid., Art. 51.

Aircraft have been made objects of prize law in the British Empire, the United States of America, Italy, and Holland, but not in France, Germany, and Japan. The British Prize Act, 1939,[3] provides, in sect. 1, that the law relating to prize shall apply in relation to aircraft and goods carried therein as it applies to ships and goods carried therein, and shall so apply notwithstanding that the aircraft is on or over land. This ambiguous provision may equally mean the application of 'subjective' prize law to aircraft. Consequential amendments of a procedural nature were made to various sections of the Naval Prize Act, 1864,[4] the Prize Courts (Procedure) Act, 1914,[5] and the Prize Courts Act, 1915.[6] Certain provisions of the 1864 Act were declared inapplicable in relation to aircraft or goods carried therein.[7] The Prize Court Rules, 1939,[8] brought up to date the Prize Court Rules, 1914,[9] by incorporating changes designed to cover the alterations in procedure rendered necessary by the application of substantive prize law to aircraft. The most important of these alterations are the new definition of Marshal as being, in addition to the Marshal himself, 'such other officer as shall be appointed by the Court to carry out the duties of the marshal under these Rules',[10] and the necessary new court forms. The first Reprisals Order-in-Council was extended, by a special Order of 17 July 1940,[11] to civil aircraft, and the Prize Salvage Act, 1944,[12] requires the consent of the Secretary of State to claims in respect of salvage services rendered in retaking an aircraft taken by the enemy.

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[1] Hague Air Rules, Art. 53.

[2] Spaight (*Aircraft in War* (1914), p. 50) has suggested that private enemy aircraft should be subject to sequestration and not to definitive capture, and that private neutral aircraft should be condemned only in respect of acts of which the capturing belligerent must, for military reasons, be the sole and sufficient judge. The difference between the conditions of air and sea traffic would justify belligerents in demanding, in the case of aircraft, that they shall have the right to act without regard to the safeguards of judgment and appeal which are found necessary in maritime cases. It is submitted that the considerations which led to this view in 1914 were valid in 1939, and are still valid in 1947.

[3] 2 & 3 Geo. 6, c. 65.

[4] 27 & 28 Vict., c. 25; sects. 2, 16, 17, 31, 40, 41, 47, 48, and 55.

[5] 4 & 5 Geo. 5, c. 13, sect. 1.

[6] 5 & 6 Geo. 5, c. 57, sect. 3.

[7] Sects. 30, 34, 35, 38, 39, 42, 43, 44, 45, 46, 48.

[8] *S.R. & O.* (1939) No. 1466/L.23.

[9] *S.R. & O.* (1914) No. 1407; amended (1914) No. 1701, (1915) Nos. 135 and 387, and (1917) No. 1349.

[10] Order I, r. 1.

[11] *S.R. & O.* (1940) No. 1324; *supra*, p. 196.

[12] 7 & 8 Geo. 6, c. 7.

The American legislation is narrower. The Act of 24 June 1941[1] provided for the application of 'objective' prize law to all aircraft, but restricts 'subjective' prize law to aircraft officered and manned by the United States and under the control of the Navy. The Italian legislation represents the most comprehensive attempt to elaborate the details of the application of 'objective' prize law to aircraft.[2] In general, the regulations are similar, *mutatis mutandis*, to those applicable to naval warfare. In the Italian Prize Tribunal, which was of mixed judicial and official composition, the places of the naval representatives were to be taken by military and civil aeronautical officials when adjudicating upon aerial prizes.[3] The Dutch rules of maritime prize apply generally to aerial prize, with certain special modifications which do not call for comment.[4] Although Japan did not apply prize law to aircraft, she subjected the treatment of vessels under convoy of enemy war aircraft to the same treatment as vessels under convoy of enemy warships.[5]

There are no reported cases, from any prize court, regarding the application of prize law to aircraft,[6] although there has been some diplomatic correspondence regarding seizures of air mails, which were treated in the same way as mails carried by surface ships.[7]

VIII. *Some statistics*

At the time of writing (October 1947) there are no complete statistics concerning the activities of the various belligerent prize courts, although it is clear that, for obvious reasons, the number of reported cases will fall considerably below that of the First World War. Nevertheless, the following preliminary figures may be of interest. Concerning the Prize Court in London, a written parliamentary answer disclosed that 466 writs seeking the condemnation of ships alone, 328 seeking the condemnation of ships together with their cargoes or items of cargoes, and 743 writs seeking the condemnation of cargoes or items of cargo alone had been issued between the commencement of the war in 1939 and the end of 1947. Decrees had been made condemning 423 ships and 582 cargoes or items of cargoes. These figures include causes instituted in overseas courts, the proceedings in which were transferred to the London Court.[1] Accurate statistics concerning the overseas courts in general are not yet available. Only a small proportion of these cases have any legal interest. The value of the condemnations is considerable. In the period between 3 September 1939 and 31 March 1946 the amount paid in to the Supreme Court Prize Deposit Account had reached £10,695,049. 19*s.* 10*d.* The figures of the detailed allocations of these receipts to the various heads of condemnations have not yet been published.[2] In the United States the inactivity of the First World War continued through the Second, until, after the unconditional surrender of Germany, libels in prize were filed in respect of captures effected during the liberation of Europe.[3] The published volumes of Italian Reports contain the texts of 181 reasoned judgments between Italy's declaration of war and March 1943: and a further 210 decisions were rendered by the Tribunal up to April 1944. These have not yet been published. There were no appeals. In France the *Conseil des Prises* functioned continuously throughout the war, and had rendered 77 decisions by the end of 1946. In addition, 8 appeals have been heard by the *Conseil d'État* and approximately 50 more cases are pending. No information is to hand concerning the activities of the Japanese courts,[4] and only isolated decisions of the German courts are available at present.[5]

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[1] 55 Stat. 261.

[2] Laws of War, Arts. 228–79. See Sandiford, *Diritto Aeronautico di Guerra* (1937).

[3] Laws of War, Art. 279.

[4] *Prijsreglement, passim.*

[5] Navy Law, new Arts. 101 and 102.

[6] But see Spaight, *Air Power and War Rights* (3rd ed., 1947), p. 487, for instances of air operations against shipping in the Second World War, and p. 411 for the capture of the Danish air-liner OY-DAM, not reported in the law reports.

[7] The correspondence mentioned in footnote 7 on p. 169, above, refers indiscriminately to sea and air mails.

Of the countries exercising jurisdiction in prize for the first occasion in modern times, two or three cases were tried in Norway in the period between the German invasion of that country and the withdrawal of the legitimate government. They concerned German vessels in Norwegian harbours on the outbreak of war. It is understood that they established no new principles. The Norwegian prize courts resumed their activities in 1947, mainly to condemn German ships allotted to Norway under the Inter-Allied Reparations Agreements which had not been condemned

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[1] House of Commons, *Official Report*, vol. 445, written answers, cols. 534–5, 17 December 1947.

[2] House of Commons, *Session Papers*, 1946–7, No. 10. No estimate is yet available of the amount of prize money distributable in respect of operations in the Second World War. It has been announced that the necessary legislation will be introduced eventually: House of Commons, *Official Report*, vol. 439, col. 431, 25 June 1947. The decrees made by the Prize Court in London do not distinguish between items condemned as droits of the Crown and those condemned as droits of Admiralty, so that it is impossible to assess the respective values of these two classes: House of Commons, *Official Report*, vol. 445, written answers, cols. 534–5, 17 December 1947.

[3] See above, p. 165.

[4] An announcement published in *Lloyd's List* of 7 April 1942 gave notice that the Sasebo Prize Court was proceeding to the examination of 102 Allied vessels seized in Shanghai after 8 December 1941.

[5] The full texts of 16 judgments of the Hamburg Prize Court and two decisions of the *Oberprisenhof* have been available for the purposes of this article. In addition, outline reports of many of the decisions of the Hamburg Court were published throughout the war in *Lloyd's List*. Nothing is known concerning the activities of the Berlin Prize Court except that, according to an annotated edition of the *Prisenordnung*, prepared by the Kaiser-Wilhelm-Institut and published in 1942, the Berlin *Prisenhof* had rendered no decisions by 1 November 1941.

aliunde, or to deal with other specialized cases. No cases were heard in the metropolitan Prize Court of the Kingdom of the Netherlands, but over 100 were tried in the Dutch Prize Court in Curaçao, as well as an unspecified number in the courts established in the Netherlands East Indies. No reports of the Dutch cases have as yet appeared.

THE RELEASE OF THE *ALTMARK*'S PRISONERS

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THE distinguished American writer Professor Hyde, in the new edition of his *International Law*,[1] clearly considers, like Professor Borchard[2] before him, that the British action in the *Altmark* incident was contrary to international law. He gives his verdict on the incident as follows:[3]

> 'In the treatment of that ship British authority seemingly yielded to the strong temptation to rescue from the clutches of the enemy prisoners whom it was zealous to set free, regardless of the injunction of international law which that authority regarded as inapplicable. The case was a fresh illustration of the fact that a belligerent state . . . is likely to be contemptuous of a duty to abstain from interference with its enemy within neutral waters, when that enemy, in making use of the same for purposes of transit, thereby gains a distinct or relative military advantage.'

Professor Hyde reaches this verdict on the supposition that the British justification rested on the ground that Norway had been remiss in permitting the *Altmark* to enjoy passage through Norwegian waters with the prisoners on board, when she had the power and opportunity to ascertain the facts and to prevent the passage. He regards this supposed British justification as without any legal basis mainly for the reasons that:

(*a*) Norway lacked the right to search a public belligerent vessel such as the *Altmark* whose immunity from the local jurisdiction in his opinion embraced immunity from search;
(*b*) even if Norway had been aware that the prisoners were on board, it was not necessarily obliged to deny passage to the ship or to make the privilege of further passage contingent upon the release of the prisoners.

The correctness of this reasoning, which is much the same as that of Professor Borchard, will be considered later. It must, however, be said at once that the legal justification for the British action does not rest upon the contention that the carriage of prisoners of war by a belligerent warship through neutral territorial waters is by itself a violation of neutrality. The British case is that the *Altmark*'s voyage through hundreds of miles of Norwegian territorial waters to escape capture was an abuse of Norway's neutrality and that the obligation to release her prisoners arose from that breach of neutrality. The humane desire to release the British prisoners provided the motive and political justification, but not the legal justification, for taking action in Norwegian waters in disregard of Norway's sovereignty.

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[1] Second revised edition (1945): reviewed by Professor Lauterpacht in this *Year Book*, 23 (1946), p. 505, where he draws attention to the views expressed concerning the *Altmark* incident.

[2] *American Journal of International Law*, 34 (1940), p. 289.

[3] Op. cit., vol. iii, p. 2337.

Professor Hyde's misunderstanding concerning the basis of the British case, which necessarily detracts from his discussion of the incident, is no doubt due to the failure of the United Kingdom Government to explain its position clearly. The first British Note to the Norwegian Government, published in the British Press on 19 February,[1] dealt primarily with the failure to detect and release the prisoners, though it did say that the case against the ship herself was such as to justify a claim for internment. Indeed, the only express complaint of a prolonged misuse of Norwegian waters by the *Altmark* to avoid capture made in any official British pronouncement was a brief reference in the Prime Minister's statement in the House of Commons on 20 February.[2] Otherwise there was no more than a hint of the true ground of the British complaint in a Foreign Office statement of 27 February[3] exposing a serious, if inadvertent, misrepresentation by Professor Koht,[4] the Norwegian Foreign Minister, to the effect that, in commenting in 1939 on the Norwegian Neutrality Regulations of 1938, the United Kingdom Government had insisted that the right of passage through territorial waters is unlimited in duration. The Foreign Office pointed out that the British comment had only reserved *a right of entry for the purpose of innocent passage* and no more. *The Times* of 22 February[3] explained briefly the British standpoint concerning the use of Norwegian waters as a 'covered way', but it must be admitted that official pronouncements did not really do so.

In these circumstances, it is not surprising that, like Professor Hyde, the Norwegian Government in its protests and official statements did not really deal with the point of the circuitous nature of the *Altmark*'s passage. Indeed, it seems probable that the Norwegian Government did not fully appreciate the nature of the British arguments until the middle of March 1940, when it received a further British Note setting these arguments out at length. But before the Norwegian reply to this Note had been received the German invasion of Norway intervened to close the incident and the Note which contains the only official statement of the main British arguments never saw the light of day.[5] The crucial point, the meaning of 'innocent passage' in Article 10 of Hague Convention No. XIII, was, however, ventilated in a paper read by Dr. Bisschof before the Grotius Society.[1]

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[1] *The Times* newspaper, 19 February 1940, p. 6, col. 3.

[2] *Hansard*, vol. 357, cols. 1163–4.

[3] See *The Times* newspaper, 27 February 1940, p. 8, col. 3.

[4] See below, p. 220.

[5] The Note has not yet been published. The writer is familiar with the main lines of the British Note but the detailed argument here presented is entirely his own responsibility.

When so authoritative a writer as Professor Hyde criticizes and condemns—however sympathetically—the British action in the *Altmark* incident without noticing the main British plea in justification, there is a risk of the judgment of history going against the United Kingdom merely by default. The present paper is offered in the hope of ensuring that, whatever the final judgment, the British case in justification is fully weighed.

The incident[2]

The *Altmark* was a German Naval Auxiliary listed as a supply ship (*Trossschiff*) in the official German Navy List of 1939. She was therefore both entitled and liable to be treated for all purposes as a warship.[3] She had operated with the *Graf Spee* in the Atlantic, after whose destruction in the River Plate she endeavoured to return to Germany with about 300 captured British merchant seamen on board. Thus, she was engaged beyond any doubt on a military operation during the voyage in question. The route by the English Channel being barred, she proceeded north-about the United Kingdom. Then, on 14 February 1940, to escape capture by the Royal Navy, she entered Norwegian territorial waters off Trondhjem instead of following a direct course to Germany. She continued to steam through territorial waters for 400 miles until on 16 February she was stopped by British destroyers under Captain Vian.

The *Altmark*'s long cruise through Norwegian waters had not, however, been uneventful.[4] A little to the south of Trondhjem Fjord she had been accosted by a Norwegian torpedo-boat whose commanding officer confined himself to examining her papers, which were found to be in order. He apparently took the view that he had no other right or duty than to verify her status as a German warship. At Sognesjoen the *Altmark* was stopped for the second time and was asked whether she carried any nationals of another belligerent state on board. The response was to tell the blank lie that she carried no such persons. When confronted with the fact that she had used her wireless in Norwegian waters, her captain declared that he was unaware of any prohibition on its use. The message, which was in cipher, and addressed to the German Legation in Oslo, was stopped by the Norwegian Government. The *Altmark* did not touch at Bergen but passed through the Bergen 'defended area', i.e. a zone about 20 miles long, access to which was absolutely forbidden to all belligerent warships by the Norwegian neutrality regulations. The relevance of this occurrence was that navigation to seaward of the 'defended area' might have forced the *Altmark* outside territorial waters and exposed her to capture on the high seas.[1]

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[1] *Transactions of the Grotius Society*, vol. 26, pp. 67–82. See also Oppenheim, *International Law*, vol. ii (6th ed.), pp. 554–6.

[2] An account of the incident with extracts from the documents appears in Hackworth, *Digest of International Law*, vol. vii, pp. 568–75.

[3] German propaganda at first protested that the *Altmark* was a merchant ship until Germany realized that its legal position was more hopeful if her status as a warship was admitted. She was in fact operating under German Naval Command.

[4] The story of the activities of Norwegian torpedo-boats was given in the Norwegian Foreign Minister's statement in the Storting on 19 February. See *The Times* newspaper, 20 February 1940, p. 8, col. 1.

The *Altmark* continued to steam southwards through territorial waters in company with a Norwegian torpedo-boat and was so escorted when encountered by British destroyers off the Joesing Fjord. While the Norwegian commanding officer protested at the entry of British warships into territorial waters, the *Altmark* sought sanctuary at the head of the fjord. Captain Vian in *Cossack*, acting on express instructions from the Admiralty, proposed to the Norwegian officer that a joint Anglo-Norwegian guard should be placed on board the *Altmark* and that she should be taken under joint escort to Bergen for the whole incident to be thoroughly investigated by the Norwegian authorities in accordance with international law.[2] The Norwegian officer declined this proposal, stating that he did so on the instructions of his Government and assuring Captain Vian that the *Altmark* had already been twice 'examined'. Norwegian official statements, which contain no reference to Captain Vian's offer, make it doubtful whether the full import of the British proposal for an investigation was appreciated by the Norwegian officer at the time. He did, however, consent to take passage in *Cossack*, at Captain Vian's invitation, to observe the British boarding action.

The *Altmark*, though wedged against an ice-pack, attempted unsuccessfully to ram *Cossack* before being boarded. The German armed guard opened fire,[3] which was returned; some of the Germans escaped over the ice and opened fire from the shore, which was also returned. The enemy sustained casualties and a member of the British boarding party was wounded. The only damage to person or property on the Norwegian side appears to have been to a Norwegian ashore who was wounded in the hand by a stray bullet. Two British officers in the midst of the mêlée dived into the icy fjord to rescue a drowning German seaman. *Cossack* removed the liberated prisoners and the British destroyers withdrew to England, leaving the *Altmark* to her own devices on the ice-pack.[4]

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[1] Navigation along the inner edge of territorial waters was not impossible but dangerous owing to reefs.

[2] *Hansard*, vol. 357, col. 1163.

[3] Professor Hyde (op. cit., p. 2339) implies that the British boarding party began the firing, but this was not so. The boarding party naturally held their fire in the hope that the enemy would submit before superior force.

[4] For the operational details see *The Times* newspaper, 19 February, p. 8.

The Norwegian and British contentions

The view taken by the Norwegian Government of its obligations in regard to the *Altmark*'s passage is clear both from the action of its naval forces and from its official statements of 19 and 25 February.[1] This view was broadly the same as that now taken by Professor Hyde, namely:

(*a*) The *Altmark*, being a German warship, was immune from search, so that Norway's only right was to verify her identity and status from her papers, as was done by the first Norwegian torpedo-boat on 14 February.

(*b*) There is nothing in international law prohibiting a belligerent from conveying prisoners through neutral territorial waters if the passage itself is legal. Accordingly, if the *Altmark*'s passage was in itself legal, Norway was not concerned to inquire whether she had prisoners on board.

(*c*) The *Altmark* did not touch at any Norwegian port but was throughout merely making passage. As neither Hague Convention No. XIII of 1907 nor the Norwegian Neutrality Regulations of 1938 contained any express time-limit for mere passage, no obligation arose for the *Altmark* to leave territorial waters after 24 hours so that her passage was in itself legal.

(*d*) As Norway had not failed in the discharge of its obligations under the law of neutrality, no ground existed for the British action in its territorial waters.

The British view briefly was that:

(*a*) The voyage of the *Altmark* through hundreds of miles of Norwegian territorial waters to escape capture by British warships went far beyond any legitimate interpretation of 'mere passage', and in fact amounted to a use of neutral waters for warlike operations.

(*b*) The *Altmark*'s passage being itself unlawful, her transport of prisoners through Norwegian waters was equally unlawful. Accordingly a duty was imposed on Norway to release the prisoners and at the very least to compel the *Altmark* to leave Norwegian waters.

(*c*) Norway had the power and opportunity to remedy the *Altmark*'s abuse of its waters but refrained from doing so. The United Kingdom thereby became entitled itself to intervene in Norwegian waters and remedy a breach of international law which, if consummated, would materially prejudice its interests.

The Germans do not appear to have regarded the legal issues as worth serious consideration. At any rate they confined themselves to propaganda statements including the lurid pronouncement in their official note of protest of 17 February[2] that the only parallel to the British action was the bombardment of Copenhagen in 1807. It is therefore sufficient to examine the four main issues raised in the conflict between the Norwegian and British points of view. These issues are: (i) the extent of a neutral's right to search a belligerent warship within its jurisdiction; (ii) the transport of prisoners of war through neutral waters; (iii) the limitations on innocent passage under Articles 10 and 12 of Hague Convention No. XIII of 1907; and (iv) a belligerent's right of self-help to remedy breaches of neutrality.

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[1] *The Times* newspaper, 20 February, p. 8, col. 1, and 26 February, p. 8, col. 7.

[2] *Documents on International Affairs*, 'Norway and the War' (Royal Institute of International Affairs), 1941, p. 35.

Search of belligerent warships

Norway's contention was in substance that a belligerent warship's immunity from the local jurisdiction extends to an immunity from search by the coastal state in the discharge of its duties as a neutral. The Norwegian contention is supported by Professor Hyde,[1] who states roundly that the *Altmark*'s immunity from the local jurisdiction embraced immunity from search. Such a drastic limitation upon the coastal state's power to carry out its obligations of neutrality derives no support, however, from the provisions of Hague Convention No. XIII, and the Norwegian contention cannot be accepted without serious qualification. Certainly the peace-time immunity from local jurisdiction applies equally in war, but questions of neutrality are on a very different plane from questions of municipal law. Not only is observance of its neutrality of the highest consequence for the neutral, but a third state is directly and vitally affected. If a belligerent warship enters neutral waters the coastal state has the duty as well as the right to see that the use made of its waters does not compromise its neutrality. If the warship commits a breach of the rules of neutrality which the coastal state had the means at its disposal to prevent, the latter equally commits a breach of international law.[2] Much more than mere observance of local laws is involved. It is therefore believed that a neutral state which has bona fide reasons for questioning a particular use of its waters by a belligerent warship has both the right and the duty to investigate the ship's activities, even to the extent of a reasonable inspection of the ship itself. In consequence, a belligerent warship which chooses to enter neutral waters must be taken to waive its sovereign immunity to the extent required for the coastal state's performance of its obligations under the laws of neutrality. Refusal of a bona fide request for inspection would, under this view, entail at the very least liability to be ordered immediately to depart.

Any other rule would stultify the whole law of maritime neutrality contained in Hague Convention No. XIII of 1907, and especially the general injunction to exercise vigilance contained in Article 25, which provides:

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[1] Op. cit., p. 2339.

[2] Hague Convention No. XIII, Art. 25.

> 'A neutral Power is bound to exercise such vigilance as the means at its disposal permit to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.'

Could it be supposed for one moment that, if Norway had had reasonable grounds for suspecting that the *Altmark*'s prisoners had been captured in Norwegian waters north of Trondhjem, it could have washed its hands of the matter after the *Altmark*'s refusal to be inspected? This would be a very limited interpretation not only of Article 25 but of Article 3 of the Convention which expressly states:

> 'When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew and to intern the prize crew.'

It is submitted that the wide immunity from search of a belligerent warship, which was apparently endorsed by the Norwegian Government, is contrary to the whole tenor of Hague Convention No. XIII. Just as, for sufficient cause, a neutral is bound to discharge its duties by taking the much stronger step of interning a belligerent warship, so, too, for sufficient cause, it must use the means at its disposal to inspect a belligerent warship in the execution of its neutral duties. Norway itself, in the *City of Flint* incident, had no hesitation in inquiring into the excuses of the German commander for anchoring in Norwegian waters and, on finding these fraudulent, in releasing the prize.[1] The question, of course, remains whether in the instant case Norway had sufficient cause for insisting on the inspection of the *Altmark*, and this brings us to our next point.

Transport of prisoners through neutral waters

The Norwegian and British views on this point do not appear to be far apart, at any rate on the surface. The British contention does not go beyond the claim that a neutral is bound to release prisoners found on board a belligerent warship which itself is not lawfully within the neutral's territorial waters. On the Norwegian side, Professor Koht, the Foreign Minister, said in a speech in the Norwegian Parliament:[2]

> 'There is nothing in international law prohibiting a belligerent from conveying prisoners through neutral territory [*sic*] if the passage itself is legal.'

Nevertheless, as there has been some disposition on the part of Norway and of the text-books to link the question of transport of prisoners with the ship's immunity from local jurisdiction, and, as it is uncertain whether Norway accepts the British contention in full, it is desirable to examine closely the alleged right of a warship to transport prisoners through neutral waters.

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[1] See Hackworth, vol. vii, pp. 482 ff., at p. 487.

[2] *The Times* newspaper, 20 February, p. 8, col. 1.

The authority usually cited in this connexion is the opinion of the United States Attorney-General Cushing in the *Sitka* incident in 1856.[1] During the Crimean War this captured Russian vessel entered San Francisco with a British prize crew on board, the Russians being held below decks as prisoners. A writ of habeas corpus was issued in the Californian courts for the release of the latter, whereupon the British commanding officer sailed away out of the jurisdiction. On being asked to advise whether the United States Government had legitimate cause for complaint the Attorney-General replied:

> 'I cannot say that, in my opinion, it was the duty of the commander of the Sitka to remain in port to answer to the order of a court having no jurisdiction of the issue; especially if there was any danger of his lawful prisoners being taken away from his custody by such process. . . .
>
> 'By the law of nations, belligerent ships of war, with their prizes, enjoy asylum in neutral ports, for the purpose of obtaining supplies or undergoing repairs according to the discretion of the neutral sovereign . . . the United States have not, by treaty with any of the present belligerents, bound themselves to accord asylum to either, but neither have the United States given notice that they will not do it, and, of course, our ports are open for lawful purposes to the ships of war of either Great Britain, France, Russia, Turkey or Sardinia. The courts of the United States have adopted unequivocally the doctrine that a ship of war, or any prize of hers in command of a public officer, of a foreign Sovereign at peace with the United States, coming into our ports and demeaning herself in a friendly manner, possesses in the ports of the United States, the right of exterritoriality and is exempt from the jurisdiction of the country. . . . The ship which the captain of the Sitka commanded was a part of the territory of his country; it was threatened with invasion from the local courts; and perhaps it was not only lawful but highly discreet to depart and avoid unprofitable controversy. A prisoner of war on board a foreign man-of-war, or her prize, cannot be released by habeas corpus issuing from the courts either of the United States or of a particular state. But if such prisoner be taken on shore, he becomes subject to the local jurisdiction or not, according as may be agreed between the political authorities of the belligerent and Neutral Power.'

It is to be observed that Attorney-General Cushing, before advising that a prisoner on board a foreign warship cannot be reached by habeas corpus owing to the ship's immunity, had made two points with reference to the *Sitka*. First, her prisoners were lawful prisoners; and secondly, her visit to San Francisco was lawful under the rules of neutrality then obtaining. If it is remembered that in 1856 it was already the established practice of the United States, when neutral, to allow the title to a foreign prize, in respect of which a breach of United States neutrality was alleged, to be litigated in United States courts,[2] the importance of the lawfulness of the activities of the *Sitka*'s captors in regard to United States neutrality as the foundation of her immunity from local jurisdiction becomes clear.

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[1] *Opinions of U.S. Attorneys-General*, vol. vii, p. 123.

[2] Hyde, op. cit., vol. iii, p. 2324.

That respect for the neutrality of the United States is a *sine qua non* of a ship's immunity from judicial or executive process in the United States was placed beyond any doubt by the Supreme Court in *The Appam.*[1] This case has, indeed, a distinct bearing on the issues raised by the *Altmark* incident. The British liner *Appam*, captured by the German raider *Moewe* off West Africa, was sent under armed guard across the Atlantic to Norfolk, Virginia, in February 1916. This curious course was taken to avoid recapture and in reliance on a pretended right to lay up prizes in the United States conferred by a treaty between Russia and the United States in 1794. The German commander, on arrival, informed the Port Collector that the liner was to be laid up as a German prize under the treaty. He held on board as prisoners her crew of about 100, and 300 other British merchant seamen from other ships destroyed by the *Moewe*. The Department of State, which from the first regarded the treaty as inapplicable and the procedure a breach of neutrality, ordered the immediate release of the prisoners. The title to the ship, in accordance with the practice in the United States, was left to be tried by the courts, and some months later the Supreme Court decreed her release on the ground of the breach of United States neutrality. The case of *The Appam* is thus clear authority for the proposition that in the United States neither the Executive nor the Judiciary will allow the principle of sovereign immunity to stand in the way of the performance by the United States of its duties of neutrality and, in particular, of releasing prisoners of war unlawfully brought within the jurisdiction. The claim of immunity was answered by the Supreme Court with the statement that the violation of neutrality was the basis of jurisdiction and that jurisdiction in each case rests upon the authority of the courts to vindicate the rights and obligations of the United States as a neutral. The practice of the United States in giving jurisdiction to the courts in matters of maritime neutrality goes back to the historic case of *The Betsey*.[2] The practice of other states is that redress in such matters is the responsibility of the Executive alone, but the obligation under international law to give redress has, of course, the same basis, namely, the obligation owed to the other belligerent to maintain a professed neutrality.

The case of the *Sitka* has an exact parallel in British practice. In 1870 a French warship entered the Firth of Forth with German prisoners on board, and the Attorney-General advised[3] as follows:

> 'First, that the French warship had a right to enter the Firth of Forth during such

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[1] (1917) 243 U.S. 124.

[2] (1794) *U.S. Prize Cases*, vol. i, p. 9.

[3] *Fontes Juris Gentium*, 'Digest of Diplomatic Correspondence, 1856–1871', vol. ii, p. 363.

> time, and for such purposes, as are allowed to belligerents in the present war under His Majesty's Proclamation.
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> 'Secondly, with regard to the assertion . . . that the German prisoners on board were ipso jure free as the ship was in neutral waters; that there is no warrant in the law of nations for such a position. So long as the Germans remained on board the French warship, they were under French jurisdiction and the neutral authorities had no right to interfere with them. If they had been landed from the warship, the question raised would have been different, as they would have passed out of French jurisdiction, and have become practically free.'

Again it is to be noted that, before the exemption of the French warship from jurisdiction was pronounced, there was an express finding of the lawfulness of her presence in the Firth of Forth. Incidentally, the opinion that a prisoner who reached shore would be 'practically free' seems more correct than the opinion on the same point expressed in the *Sitka*.

The principle of the case just quoted and of the *Sitka* is somewhat anomalous because it may fairly be argued that the detention of prisoners by duress is the continuance within territorial waters of a warlike act begun outside. It is also true that the cases occurred many years before the rules of neutrality were clarified and tightened up by the Hague Conventions of 1907. Nevertheless, it is believed that they still represent the law and the modern practice in regard to the transport of prisoners by sea. Thus at the time of the *Altmark* incident the German Legation in Guatemala made great play with the recent passage of the S.S. *Düsseldorf* through the Panama Canal under a British prize crew with the German crew held as prisoners.[1] The passage of the *Düsseldorf* through the neutral waters of the canal was, of course, far from being the exact parallel claimed by the Germans. For it was the normal necessary route for a ship bound from the Pacific to the Atlantic, whereas the *Altmark*'s route bore no relation to normal navigation. But the *Düsseldorf* incident does fully confirm the continued validity of the principle of the *Sitka*. No doubt there were numerous other instances when a warship carrying prisoners, e.g. survivors from a sunk U-boat, called at a neutral port for fuel or supplies under the relevant provisions of Hague Convention No. XIII without any question being raised concerning the prisoners. On the other hand, *The Appam* shows that the principle of the *Sitka* is limited to cases where the presence of the ship in neutral waters—whether in visit or passage—does not itself constitute a breach of neutrality. Indeed, the shipmates of the *Altmark*'s prisoners held in the *Graf Spee* were released by the Uruguayan Government when the *Graf Spee* demanded special facilities for repairs in Montevideo.[2] It may therefore be that the principle of the *Sitka* is further limited to cases of normal visit or passage and that extension of a visit beyond 24 hours for special, though lawful, reasons is enough to render detention of prisoners in neutral waters inconsistent with neutrality.

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[1] Indeed, one of the prisoners, who had gained admission to the United States jurisdiction on a false pretence of illness, was returned to British custody. See Hackworth, vol. vii, p. 575.

[2] *The Times* newspaper, 15 December 1939, p. 8, col. 3.

If the foregoing is accepted, it seems evident that Oppenheim[1] and Hall[2] go too far in attributing the principle of the *Sitka* directly to a warship's immunity from the local jurisdiction. Surely its true foundation is the fact that on the sea, unlike on the land, an organized military force in the shape of a warship may traverse neutral jurisdiction as a channel of passage without breach of neutrality. It is because the prisoners are part of a military unit lawfully in passage that they are no concern of the neutral state. The needs of maritime navigation prevail over the duties of neutrality.[3] As there is no breach of the law of neutrality to found a special jurisdiction, the normal immunity of a public ship operates to stop any ordinary executive or judicial action in regard to the prisoners. But the moment the ship herself is in breach of neutrality, her normal immunity is no bar to action in regard to the prisoners founded on the breach.

Accordingly, it is submitted that in the *Altmark* incident the Norwegian Government had the following obligations:

(*a*) to countenance the transport of the prisoners through Norwegian waters so long as the *Altmark* did not herself infringe the rules of neutrality;

(*b*) to intervene and release the prisoners if the *Altmark*'s presence in Norwegian waters at any stage ceased to be consistent with the rules of neutrality. In the latter event the further obligation would arise to intern the *Altmark* (not demanded by the United Kingdom) or at least to compel her departure from Norwegian waters.

Thus, as the Norwegian Foreign Minister himself declared, the question whether Norway failed in the duties of neutrality turned upon the legality of the *Altmark*'s prolonged passage through its territorial waters.

Innocent passage of belligerent warships under Articles 10 and 12 of Hague Convention No. XIII

The texts of Articles 10 and 12 of Hague Convention No. XIII are as follows:

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[1] *International Law*, vol. ii (6th ed. by Lauterpacht, 1940), p. 590.

[2] *International Law* (8th ed., 1924), p. 738.

[3] It is impossible for this reason to accept the argument advanced at a meeting of the Netherlands International Law Society on 30 March 1940 that, as the *Altmark* was not a warship, she had no right to retain prisoners on board in neutral waters (see *Transactions of the Grotius Society*, vol. 26, p. 79). Even if she had not in fact been a warship, she was plainly *publicis usibus destinata* and a military ship. The other suggestion, that she was an unlawful warship because supposed not to be under command of a naval officer, or, as the editor of Oppenheim suggests (op. cit., p. 590, n. 8), because not fully converted under Hague Convention No. VII, is in any case believed to confuse the status of warship and auxiliary. There is no rule of international law requiring all military and naval transports to be men-of-war.

Article 10: 'The neutrality of a Power is not affected by the mere passage (*le simple passage*) through its territorial waters of warships or prizes belonging to belligerents.'

Article 12: 'In default of special provisions to the contrary in the laws of a neutral Power, warships of the belligerents are forbidden to remain in the ports, roadsteads, or territorial waters of the said Power for more than 24 hours, except in the cases covered by the present Convention.'

The Norwegian Neutrality Regulations[1] were modelled upon an Agreement between Norway, Denmark, Finland, Iceland, and Sweden, signed at Stockholm on 27 May 1938. These Regulations, broadly speaking, restated in different language the provisions of Hague Convention No. XIII relating to the entry of belligerent warships into the ports, roadsteads, and territorial waters of a neutral state. Article 10 of the Convention had no direct counterpart in the Regulations but was only implicit in Article 1 of the Regulations, which provided: 'Belligerent warships shall be granted admission to the ports and other territorial waters of the Kingdom, subject to the following exceptions restrictions and conditions.' The subsequent qualifications on admission included, with minor variations of language, the 24 hours' rule contained in Article 12 of the Convention. The fact that the Norwegian Regulations did not in terms prescribe that the right of passage was one limited to 'mere' passage certainly could not be held to enlarge the right beyond that permitted under the Convention. Article 10 of the Convention is now accepted as declaratory of international law upon the point, and it states 'mere passage' to be the maximum consistent with neutrality. In any case, the Norwegian Government both in the *Altmark* incident and in the previous incident of the *City of Flint* did not claim that its neutrality regulations enlarged the rights of belligerent warships in Norwegian waters beyond that in Article 10 of the Convention.

The Norwegian contentions were that:

(*a*) The Convention places no limit upon the duration of 'mere passage'; for whereas Article 12 dealing with visit sets a time-limit of 24 hours, Article 10 dealing with passage mentions no limit. In other words, the absence of any limit in Article 10 gains emphasis from the presence of one in Article 12. Accordingly, the *Altmark* had a right of unlimited passage through Norwegian waters.

(*b*) Article 12, establishing the 24 hours' rule of stay, deals only with 'stay' in the sense of halt in neutral waters, and does not touch 'passage', which is dealt with only under Article 10. As the *Altmark* did not call at Bergen or at any other Norwegian port, no question of the 24 hours' rule arose.

It will shortly be submitted that neither of these contentions can be accepted. It must, however, be conceded that they are broadly consistent with the attitude adopted by the Norwegian Government in the previous incident of the *City of Flint*.[1] This United States ship had entered Tromso on 21 October under a German prize crew and was allowed to prolong her call for the special purpose of landing—voluntarily—captured British merchant seamen who were detained on board.[2] On departure she was permitted to make passage through Norwegian territorial waters for an additional 24 hours. Germany protested at this restriction and Norway replied that, as a call had been made, the 24 hours' rule came into play, but that, if no call had been made, Norway would have agreed with the German contention that no time-limit would be imposed by international law on passage through Norwegian waters. There followed the curious interlude of the *City of Flint*'s visit to Murmansk, apparently to find a refuge from the Royal Navy. On failing to obtain sanctuary there, the ship attempted to reach Germany by steaming through the whole length of Norwegian territorial waters. Her voyage, in fact, terminated at Haugesund because she elected to anchor there in face of the objections of the local authorities and in breach of Article 21 of Hague Convention No. XIII relating to the entry of prizes into neutral ports. But what is significant for our present purpose is that, if the *City of Flint* had not made this stop, Norway considered that there was no objection in law to her unbroken passage through many hundreds of miles of its territorial waters covering several days.

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[1] Brought into force by Royal Decree of 1 September 1939. Their text is set out in *American Journal of International Law*, 32 (1938), Suppl., p. 154.

The Norwegian argument, that the Convention imposes no time-limit on mere passage because Article 10 mentions none, disregards the provenance and purpose of this Article. As is well known, Article 10 was a non-committal formula to cover the difference between the British view that the Convention ought not to be taken to authorize neutrals to forbid innocent passage through territorial waters altogether, and the view of other states that neutrals must possess this right at any rate to the extent necessary to protect their neutrality.[3] The present negative form of the Article was adopted in order to leave the general question at large and at the same time to place on record that in sea, unlike land, warfare passage through neutral jurisdiction does not, by itself, compromise neutrality. In these circumstances, it seems going a long way to interpret the Article as intending to permit passage without time-limit, i.e. to put passage outside the 24 hours' rule laid down in subsequent Articles. On the contrary, it is submitted that the question is left entirely open by Article 10 and must be decided by reference to the particular language of the subsequent Articles.

The crucial words in Article 12 are 'warships . . . are forbidden to remain in

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[1] For the details of this incident see Hackworth, vol. vii, pp. 482–8.

[2] It appears that the prisoners requested the German captain to release them and he did so.

[3] *Actes et Documents*, vol. i, p. 305; Pearce Higgins, *The Hague Peace Conference*, pp. 467–8.

(*demeurer dans*) the ports, roadsteads, or territorial waters of the said Power for more than 24 hours, except in the cases covered by the present Convention'. The Norwegian argument presumably is that the words 'remain in' —*demeurer dans*—refer only to 'stops' in neutral waters or alternatively that passage is one of the exceptions covered by the Convention, namely, in Article 10. The latter argument, for the reasons just given, is considered inadmissible. The question then is whether the words 'remain in' —*demeurer dans*—confine the 24 hours' rule to 'stops' within territorial waters or apply it equally to every entry into neutral waters, including mere passage. Literal interpretation of international conventions ought not to be pressed too far, but it is to be observed that the verbs used in both the English and the French text in their natural meaning cover both stops and passage. The choice of the wider and natural interpretation of Article 12 is, if anything, strengthened by the language of Article 13 which applies the 24 hours' rule to the situation at the outbreak of war. The later Article requires a neutral, on learning that 'a warship of a belligerent "is" —"*se trouve*"—in one of its ports, roadsteads, or territorial waters', to notify it to depart within 24 hours.[1] Here, too, the language in its natural meaning is apt to cover any belligerent warship within the neutral's jurisdiction whether stopped or in passage. It has also to be explained why, if the 24 hours' rule is not a general limit upon stay within neutral jurisdiction, the difference between visit and passage is not emphasized in Article 12. Whenever a ship stops in a neutral port the practical point arises whether she may afterwards continue to steam in territorial waters beyond the allotted 24 hours. Coastwise passage in territorial waters after leaving port, if made bona fide in the ordinary course of navigation, would appear to be no different in kind from other cases of passage. Norway in the *City of Flint* and the *Altmark* incidents interpreted the words in Article 12, 'forbidden to remain in the ports, roadsteads, or territorial waters', as covering passage in territorial waters subsequent to a stop but not such passage without a stop. An interpretation that the words 'remain in' refer only to a stop and not to passage is intelligible, if not very conducive to strict neutrality. An interpretation that the words refer both to a stop and to passage after a stop, but not to passage without a stop, appears to be arbitrary. And what happens if a ship, *after* travelling in neutral territorial waters for more than 24 hours, calls at a port for two or three hours to take on water? Presumably, on the Norwegian view, her prolonged passage, which before was 'mere passage' without time-limit, is brought within Article 12 by reason of the brief call made as an ordinary incident of navigation so that she ought to be forbidden entry, if not interned. The logic of such a doctrine is unconvincing. In any event, Norway's decision to grant the *City of Flint* 24 clear hours of passage in territorial waters *after* her departure from Tromso for Murmansk does not fit in with its own or any other interpretation of Article 12.

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[1] The full text of Art. 13 is as follows: 'If a Power which has been informed of the outbreak of hostilities learns that a warship of a belligerent is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within 24 hours or within the time prescribed by the local law.'

The Norwegian Government's doctrine of an unlimited right of mere passage derived no support from the text of its own neutrality proclamation[1] nor from the similar proclamations of the other four northern neutrals. For the proclamation, designed as a complete code, simply admitted 'belligerent warships to its ports and other territorial waters' and then forbade them to 'remain in' those waters for more than 24 hours. There was no separate reference to a right of passage and no indication that passage was excluded from the time-limit. Indeed, the United Kingdom appears at first to have interpreted the absence of any mention of passage in the Regulations as intended to exclude any entry into territorial waters for purposes of passage, as distinct from visit. Its comment on the Regulations, delivered on 23 May 1939, to which reference has been made above in connexion with Professor Koht's misstatement, was as follows:[2]

> 'While His Majesty's Government do not deny that there may, in special circumstances, be a right to refuse belligerent warships entry into neutral territorial waters, they have always maintained, and must continue to maintain, the existence of such a right of entry for the purposes of innocent passage, and they are not aware of any case in which it has been refused by neutrals to belligerents for these purposes.'

The Norwegian reply, delivered on 2 September 1939, was far from suggesting that the Regulations envisaged a right of 'mere passage' unlimited in duration. For it said:

> 'The Norwegian Government would observe that according to the general principle expressed in Art. 1, belligerent warships are admitted into Norwegian ports and other territorial waters.'

This sibylline reply seems to confirm the view already expressed that Norway, in its Neutrality Regulations, including that concerning the 24 hours' rule, made no distinction between entry for passage and entry for other purposes.

The Pan-American General Declaration of Neutrality of 3 October 1939 was no more helpful to Norway.[3] It declared that, as one of the existing standards of neutrality, the American Republics 'may determine, with regard to belligerent warships that . . . in any case they shall not be allowed to remain for more than 24 hours'. No exception or difference was made for cases of passage, and no other Article dealt with passage. The United States Proclamation of 5 September 1939[1] was even more definite:

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[1] *Art.* 1: 'Belligerent warships shall be granted admission to the ports and other territorial waters of the Kingdom subject to the following exceptions, restrictions, and conditions.'

Art. 4 (i): 'Belligerent warships shall not be permitted to remain in Norwegian ports and anchorages or in other Norwegian territorial waters, for more than 24 hours, save in the event of their having suffered damage or run aground or under stress of weather, etc.'

[2] *The Times* newspaper, 27 February 1940, p. 8, col. 3.

[3] Chap. V, para. 3 (*d*); see *American Journal of International Law*, 34 (1940), Suppl., at p. 10.

> 'If any ship of war of a belligerent shall, after the time this notification takes effect, be found in, or shall enter any port, harbour, roadstead, or waters subject to the jurisdiction of the United States, such vessel shall not be permitted to remain in such port, harbour, roadstead or waters more than 24 hours except in case of stress of weather, etc.'

Again, there was no separate provision concerning passage. If any doubt remained as to the United States interpretation of Article 12, it was removed by the Proclamation of the same date applying the Neutrality Proclamation to the Canal Zone.[2] Section 1 of the second Proclamation stated:

> 'The limit of 24 hours prescribed by the above proclamation, with certain exceptions, as the maximum time a belligerent ship of war may *remain within the jurisdiction* of the United States shall apply to the total time such ship of war may remain in all the waters of the Canal Zone except that the time required to transit the Canal shall be in addition to the prescribed 24 hours.'

The exceptional extension of time was of course demanded by the *necessary* passage of the Canal for longer than 24 hours, and the implication is that, without this special provision, the time for the passage would have been included within the 24 hours' rule. It is also right to say that the only British neutrality instructions based upon Hague Convention No. XIII, namely, those of 1912,[3] appear to regard the 24 hours' rule as of universal application. They simply declared:

> 'If, after the date hereof any ship of war of either belligerent shall enter any such port, roadstead, or waters subject to the territorial waters of the British Crown, such ship shall depart and put to sea within 24 hours *after her entrance into* any such port, roadstead or waters.'

Despite Great Britain's persistent championing of innocent passage, no exception or special provision was made for passage in regard to the 24 hours' rule.

Accordingly it is submitted that the Norwegian contention that Hague Convention No. XIII imposes no time-limit upon passage through territorial waters is questionable. It seems contrary to (*a*) the natural meaning of the language of the Convention, (*b*) the natural meaning of Norway's own Regulations interpreting the Convention, and (*c*) the interpretation of the 24 hours' rule adopted in the proclamations of other states. It is further submitted that a state which, whether rightly or wrongly, does not apply the 24 hours' rule to 'mere passage' in territorial waters is called upon to be particularly scrupulous in confining passage to the 'mere' passage specified in Article 10 of the Convention. The meaning of 'mere passage' in this Article has now to be examined.

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[1] See *American Journal of International Law*, 34 (1940), Suppl., p. 21, at p. 24.

[2] Ibid., p. 28, at p. 29.

[3] Rule 2. See *State Papers*, vol. cv, p. 169.

The text of Article 10 was drafted by the British delegation at the 1907 Conference, and Sir E. Satow then explained that 'mere passage' denoted 'la liberté de traverser en temps de guerre comme en temps de paix les eaux territoriales'.[1] The view of the United Kingdom, expressed in the *Altmark* incident, is that the intent of Article 10 was only to allow innocent passage through such territorial waters as would reasonably form part of a ship's normal course from the point of her departure to her destination. In other words, the right, which it was the object of Article 10 to safeguard, was a right of passage for reasons of navigation and not for the purpose of gaining advantage from the neutrality of the waters. The logic of this contention is believed to be unanswerable. Any other construction of Article 10 is an open invitation to the abuse of neutral waters and would be calculated to provoke frequent hostilities within them.

Even in peace-time the passage of a foreign warship through mile after mile of territorial waters, when following a circuitous, abnormal course, would be regarded by the coastal state as non-innocent and unfriendly to itself. In war-time such a passage can only be regarded as either unfriendly to the coastal state or as having the object of gaining a military advantage from the neutrality of the waters. It cannot be regarded as innocent or as 'mere' passage. The object of the *Altmark*, as of the *City of Flint*, was unquestionably to obtain in Norwegian waters the protection of the rule of neutrality which forbids hostile action in neutral waters, in order that she might escape capture by the Royal Navy. The *Altmark*'s voyage was extravagantly circuitous and her passage through Norwegian waters bore no relation whatever to ordinary navigational passage. She had travelled 400 miles in territorial waters before interception and was apparently intending to remain in them for another 200 miles—a total of more than 3 days' steaming in neutral waters. She was seeking to use them as a protected corridor through which she could complete her military operation of returning to Germany with her prisoners of war. In consequence she would seem to have used Norwegian waters as a base for a defensive naval operation contrary to the intendment, if not to the express language, of Article 5 of Hague Convention No. XIII, under which 'belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries . . .'.

It may, on the other hand, be contended on Norway's behalf that belligerent warships have not infrequently sought asylum in territorial waters from their enemies and that such asylum is not in principle forbidden by international law. Hague Convention No. XIII makes no distinction as to the reasons for entering neutral territorial waters or for visiting neutral ports. The Convention does not in terms prohibit resort to neutral waters for shelter from attack subject to the general restrictions concerning length of stay, repairs, fuel, &c., being observed. Uruguay, for example, did not intern the *Graf Spee* immediately for seeking shelter from Admiral Harwood's cruisers, but allotted her 48 hours for repairs. Nevertheless, there is considerable force in the British argument that to resort to neutral waters for shelter from the enemy is to use them as a base of naval operations within the meaning of Article 5. Westlake, writing in 1907, said:[1]

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[1] *Actes et Documents*, vol. iii, p. 721.

> 'When refuge is given even for a limited time to a ship of war flying from an enemy, in which must be included the case of escape after defeat although no pursuer may be following close, we have not to do with that aid of a merely general nature which cannot fail to be received from any use of a neutral port, but with the interruption of a specific operation of war to the advantage of the belligerent who is received but not interned.'

The inconsistency with modern standards of neutral duty of such a use of neutral ports and waters directly in furtherance of current naval operations has received increasing recognition. The Neutrality Regulations of Norway, as of the other northern neutrals and of the United States, refuse any repair of damage sustained in action. Article 9 of the Havana Convention on Maritime Neutrality of 1928 also excluded action damage.[2] And why? Hague Convention No. XIII does not in terms forbid such repairs, but to allow them is out of harmony with Article 5 which forbids the use of neutral waters as a base of operations. The United States Naval War College International Law Situation of 1939[3] contains this passage:

> 'In so far as permission *to enter* is concerned, international law does not distinguish between the causes of the distress. . . . Once admitted in distress, a belligerent warship is subject to varying treatment depending upon the causes of the distress. What should be done *after* admission is therefore a separate problem from that of the original entry. Force majeure gives a *right of entry only* but no necessary right to repair the damage, to replenish supplies, to depart freely, or to be immune from internment. The distress must be genuine.'

Despite these developments and the common sense of the British contention, it can hardly be claimed that by 1940 the law of neutrality recognized a general duty in neutrals to admit warships seeking shelter from the enemy only on condition of internment. Uruguay's treatment of the *Graf Spee* and other analogous cases are plain evidence to the contrary.

Even so, there is a considerable difference between allowing a ship to enter a neutral port for refuge under strict surveillance with a time-limit of 24 hours and to allow a ship to steam more or less indefinitely in neutral waters to avoid hostile action. The present writer's contention is that—apart from the duration of the passage—a manifestly abnormal course through territorial waters to escape attack is not 'mere passage', which is the only form of passage allowed by Article 10 of Hague Convention No. XIII. General international law may not forbid *entry* into neutral waters for refuge subject to the provisions of the Convention concerning length of stay, repairs, &c., but Article 10 does specifically restrict passage to mere passage. The Norwegian thesis that the 24 hours' rule does not apply to passage, in itself open to serious question, becomes wholly inadmissible when combined with a view of innocent passage which regards as mere passage a circuitous course through territorial waters to obtain the protection of the coastal state's neutrality.

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[1] *International Law*, vol. ii (War), p. 209.

[2] *American Journal of International Law*, 22 (1928), p. 151, at p. 154. Uruguay did not, however, apply this Convention when dealing with the *Graf Spee*.

[3] Ibid., p. 44.

The use of Norwegian territorial waters as a 'protected corridor' or 'privileged channel' by Germany did not become an issue for the first time in 1940. In 1916 the Allies in a memorandum circulated to neutrals invited them to close their territorial waters to submarines in view of the grave danger of abuse. Norway, emphasizing that it was changing its neutrality rules on the point solely to protect its own neutrality, issued a proclamation excluding submarines except in case of distress.[1] By 1918 Allied mine-laying had rendered the U-boat routes to their operational areas in the Atlantic more and more dangerous, with the result that U-boats sought a safe passage through Norwegian territorial waters despite the proclamation. The evidence was convincing, and in August the United Kingdom and the United States separately urged the Norwegian Government to mine its territorial waters opposite the end of the northern mine-barrage.[2] The United States Chargé d'Affaires in Norway, on instructions from Secretary of State Lansing, used the following language to the Norwegian Foreign Minister:[3]

> 'The United States believed Norwegian territorial waters could justly be regarded as a base of naval operations if they are used by German Submarines as a rendez-vous, [*sic*] whence the latter can freely pass into the Atlantic Ocean for hostile purposes. . . . So long as the Norwegians failed to prevent the passage of submarines through coastal waters, there was no essential difference between the situation created for German submarines in Norwegian waters by the protection afforded them by our respect for Norwegian neutrality . . . and the situation in which submarines found themselves when under the protection of German fortresses and minefields at their German base.'

The Norwegian Foreign Minister queried the word 'rendez-vous', for the Allies had made no allegations of rendez-vous between U-boats and supply ships. It is clear from an earlier United States Note[4] that rendez-vous was only a somewhat infelicitous term to describe the use of Norwegian waters as a safe corridor. For the United States Government had then said: 'the consequence has been the establishment of a privileged channel for the submarines of an enemy of this country *as a route to and from his area of operations*, resulting in facilitating the destruction of American ships and lives.' The United States Government in the same Note described this passage of Norwegian territorial waters by U-boats as a violation of neutrality. In other words, the standpoint of the United States Government in regard to the use of Norwegian territorial waters in 1918 was precisely the same as that of His Majesty's Government in regard to their use by the *Altmark* in 1940. Norway, still making no admission as to its obligations and still maintaining that it acted solely in defence of its own interests, finally laid the desired minefields in the first week of October 1918. Norway in 1940 was, at any rate, on notice that the United Kingdom Government regarded as a violation of neutrality the passage of warships through neutral territorial waters, not in the ordinary course of navigation but for protection, and that in this it was supported by the leading maritime neutral, the United States.

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[1] See *United States Foreign Relations*, 1916, Supplement, pp. 777–8.

[2] See ibid., 1918, Supplement I, vol. ii, pp. 1769–89.

[3] Ibid., p. 1784.

[4] Ibid., p. 1772.

Summing up the argument concerning the *Altmark*'s passage, it is submitted that:

(*a*) Norway's view that passage is covered only by Article 10 and is not touched by the 24 hours' rule of Article 12 ought not to be accepted. Norway was therefore in default in permitting the *Altmark*'s passage to exceed 24 hours.

(*b*) The *Altmark*'s circuitous passage to escape attack was not 'mere passage' within the meaning of Article 10, but a use of Norwegian waters for defensive naval operations contrary to Article 5. Norway was therefore in default in allowing such passage at all.

(*c*) Even if a breach of Article 5 is not regarded as conclusively established under the existing rules of international law, the *Altmark*'s use of Norwegian waters was undeniably for refuge as well as for passage. In these circumstances it was inadmissible for Norway to regard the *Altmark*'s passage as 'mere passage' within the meaning of Article 10, and accordingly Norway ought at least to have limited her use of Norwegian waters to 24 hours under Article 12.[1]

A belligerent's right of self-help to redress breaches of neutrality

If Norway, by approving the *Altmark*'s protracted passage through its territorial waters, was correctly regarded by the United Kingdom as having failed in its neutral duties, there will be little disposition to query the legitimacy of the British action in entering Norwegian waters to redress the breach. A breach of the rules of maritime neutrality in favour of one belligerent commonly threatens the security if not the existence of the other belligerent. The breach is thus seldom really capable of being remedied in full by subsequent payment of compensation. Nothing but the immediate cessation of the breach will suffice. Accordingly, where material prejudice to a belligerent's interests will result from its continuance, the principle of self-preservation would appear fully to justify intervention in neutral waters.[1] The disposition in the past of some neutral opinion to condemn any such action out of hand was therefore not consistent with general principles and in any case flowed from a view of the superior merits of neutral status which no longer obtains. The right of a belligerent to intervene in a proper case to enforce neutrality is now generally recognized, and it is unnecessary to examine the authorities and precedents. It will be enough for our present purpose to cite Professor Hyde[2] on the subject:

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[1] This last submission appears to be the view favoured by the Editor of Oppenheim's *International Law*, vol. ii (6th ed., 1940), p. 555, n. 1.

> 'The obligation resting upon the belligerent with respect to the neutral is not of unlimited scope. Circumstances may arise when the belligerent is excused from disregarding the prohibition. If a neutral possesses neither the power nor disposition to check warlike activities within its own domain, the belligerent that in consequence is injured or threatened with immediate injury would appear to be free from the normal obligation to refrain from the commission of hostile acts therein. In naval warfare such a situation may arise through the presence of vessels of war of opposing belligerents simultaneously in the neutral port or roadstead.'

Article 25 of Hague Convention No. XIII requires a neutral to exercise such vigilance to prevent violation of the provisions of the Convention *as the means at its disposal permit.* A belligerent, therefore, has normally no right of self-help until it is apparent that the neutral either has no means to prevent the breach or has no disposition to use the available means. Before the British destroyers intercepted the *Altmark*, a Norwegian torpedo-boat had three times accosted the *Altmark* without enforcing what the United Kingdom conceived to be Norway's duty. Norway thus unquestionably had the necessary means at its disposal but not, to all appearances, the intention of using them. Even then the United Kingdom did not at once take the matter into its own hands but invited Norway to bring the *Altmark* into Bergen and there investigate the facts and the rights and wrongs of the incident. Only after this proposal had been declined was Norway's jurisdiction finally flouted. At this stage the alternative to self-help was to permit 300 invaluable merchant seamen to pass into enemy prison camps beyond any practical possibility of recovery. Military and humanitarian considerations combined to provide a powerful motive for applying the remedy of self-help in the instant case. It is therefore submitted, with some confidence, that, if occasion existed for intervention, that occasion was not abused.

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[1] See Oppenheim, op. cit., vol. i (6th ed., 1947), pp. 265–9, and cf. ibid., vol. ii (6th ed., 1940), p. 614.

[2] Op. cit., vol. iii (2nd ed.), p. 2337.

Conclusions

The propriety of *Cossack*'s exploit in Sojn Fjord, tested by the principles of international law, thus depends, in the writer's opinion, on the legality or otherwise of the *Altmark*'s protracted passage through territorial waters and on nothing else. If that passage was unlawful, the carriage of prisoners of war in Norwegian waters was also unlawful—cf. *The Appam*. If that passage was unlawful, Norway had a duty to examine the *Altmark* for the prisoners she was suspected of carrying and, if found, to release them. If that passage was unlawful, Norway's failure to use the means at its disposal to terminate the passage and release the prisoners justified *Cossack*'s intervention in Norwegian waters. As will have emerged from the present paper, the question of the legality of the *Altmark*'s passage was one of some complexity and it is no part of the writer's purpose to pass a political judgment on the action of the Norwegian Government in the then-existing situation. Nevertheless, for the reasons given above, it is believed that Norway, in allowing to a belligerent warship a protracted use of its waters for shelter, fell short of the commonly understood duties of neutrality. Moreover, although no emphasis has here been placed on the authority given to the *Altmark* to proceed through the Bergen 'defended area', that also was a matter which the United Kingdom was entitled to take into serious account.

Nothing has yet been said about any right that the United Kingdom might have to justify its action by reference to the Covenant of the League of Nations and the Pact of Paris of 1928, though in its final Note the United Kingdom reserved this point. Certainly, the United Kingdom, having become belligerent to resist an unmistakable aggressor, would appear to have had no less right to appeal to the Covenant and the Pact of Paris as a special justification for its action in regard to Norway's neutrality than subsequently the United States to the Pact of Paris when seeking to justify its actions in regard to its own neutrality.[1] It is, however, one of the quaint features of the *Altmark* incident that Norway's Foreign Minister should have seen nothing incongruous in suggesting, as he did in the Storting on 19 February 1940, that Norway might take its dispute with the United Kingdom before the League of Nations.[2] Nor, apparently, was M. Hambro, President of the Storting, conscious of any absurdity when, on the same occasion, he found a particular ground for criticizing the British action in the fact that both Norway and the United Kingdom were

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[1] See Oppenheim, op. cit., vol. ii (6th ed., 1940), pp. 501–5.

[2] See *The Times* newspaper, 20 February 1940, p. 8, col. 2.

'bound by obligations arising from membership of the League of Nations'. That high Norwegian authorities should have been brought so to regard the obligations of the Covenant in 1940 is a measure of the extent to which the hopes inspiring it were disappointed. But in the actual circumstances of the breakdown of collective security under the League, it would not be useful to pursue this aspect of the question.

GERMAN EXTERNAL ASSETS

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THE principle to be followed in regard to German external property was laid down by the Tripartite Conference held at Potsdam between 17 July and 2 August 1945. It was agreed[1] that reparation claims of the U.S.S.R. (who undertook to settle Poland's claims from its own share of reparations),[2] the United States, the United Kingdom, and 'other countries entitled to reparations' shall be met by removals from the zones of occupation in Germany and 'from appropriate German external assets'. This agreement was supplemented by provisions which contained mutual waivers and, consequently, implied grants. The United States and the United Kingdom agreed to 'renounce their claims in respect of reparations to . . . German foreign assets in Bulgaria, Finland, Hungary, Roumania and Eastern Austria', and the Soviet Government renounced such claims to German foreign assets in countries other than these five. The result, therefore, was that assets in the five eastern countries were allocated to the U.S.S.R., while the assets in other foreign countries were to be shared by the rest of the claimant states.

The Potsdam Conference also agreed that appropriate steps should be taken by the Control Council for Germany (comprising the United States, Soviet, French, and British Commanders-in-Chief) 'to exercise control and the power of disposition over German-owned external assets not already under the control of United Nations which have taken part in the war against Germany'[3]—a pronouncement clearly directed against German assets in neutral and satellite countries. In pursuance of these instructions, on 20 September 1945 the four Commanders-in-Chief, acting as Representatives of the four principal Allies rather than as Control Council for Germany, issued a Proclamation which had the effect of 'freezing' all property, assets, rights, titles, and interests situated outside Germany 'of any person resident or carrying on business in Germany' (irrespective of nationality).[4]

On 30 October 1945 this was followed by Control Council Law No. 5,[5] a piece of German legislation relating to Vesting and Marshalling of German External Assets. It created the German External Property Commission and vested in it all rights, titles, and interests in respect of any property outside Germany (but excluding the United States, the U.S.S.R., France, the United Kingdom, the British Empire, and any other of the United Nations determined by the Control Council) which is owned or controlled by

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[1] Chapter IV of the Potsdam Declaration.

[2] On 16 August 1945 the U.S.S.R. and Poland made an Agreement under which the former relinquished in the latter's favour all claims 'to German property and other assets and also to shares of German industrial and transport enterprises throughout the territory of Poland, including that part of the territory of Germany which passes to Poland': *Department of State Bulletin*, 12 (1945), p. 777.

[3] Chapter III, para. 18.

[4] Proclamation No. 2, clause 14, *Control Council Gazette*, No. 1, p. 8.

[5] *Control Council Gazette*, No. 2, p. 27. According to the preamble the Control Council acted in accordance with the decisions of the Potsdam Conference and 'the political and economic

(*a*) any person of German nationality inside Germany;
(*b*) any person of German nationality outside Germany who was a German citizen on or after 1 September 1939, and who at any time since that date was within territory under the control of Germany or who aided Germany or her Allies during or in preparation of the war, except citizens of any country annexed or claimed to have been annexed by Germany since 21 December 1937;
(*c*) any branch of any business or corporation or other legal entity organized under the laws of Germany or having its principal place of business in Germany.

By Article X the term 'property' is defined in great detail; it includes interests transferred to or held by trustees, property transferred 'by way of gift or otherwise or for consideration express or implied, but not including the rights or interests of third parties to a bona fide sale for full consideration'. According to Article V the question whether or not any compensation shall be paid to any person whose property has been vested will be decided at such time and in such manner as the Control Council may in the future determine.

The eastern countries. The Peace Treaties made with Roumania, Bulgaria, Hungary, and Finland[1] contain identical clauses according to which, for example, in the case of Hungary that country 'recognizes that the Soviet Union is entitled to all German assets in Hungary transferred to the Soviet Union by the Control Council for Germany'.[2] Nothing seems to be known concerning developments in any of these countries other than Hungary. In Hungary, however, in the summer of 1947 the problem of the German assets led to a crisis, as a result of which the then Hungarian Government fell. The root of the trouble can be diagnosed without much difficulty. It

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principles by which it is necessary to be guided in dealing with this problem. The following observations in the text represent a summary of the law as amplified by Regulation No. 1 of 10 May 1946 (*Control Council Gazette*, No. 8, p. 160).

[1] Cmd. 7022.

[2] Art. 28; see Roumanian Treaty, Art. 26, Bulgarian Treaty, Art. 24, Finnish Treaty, Art. 26. Under the Armistice Agreements Finland, Roumania, Bulgaria, and Hungary undertook to block property belonging to Germany or her nationals or persons resident in German or German-occupied territory: see Arts. 16, 8, 13, and 8 of the respective texts in 'Official Documents', *American Journal of International Law*, 39 (1945), Suppl., pp. 85–97.

lies not only in the fact (which will reappear as a dominant one) that the term 'German assets' lacks definition, but also in the circumstance that the Peace Treaty qualifies the Soviet Union's title by speaking of 'German assets . . . transferred to the Soviet Union by the Control Council for Germany'. These words, which, as will be seen, do not occur in the Treaty with Italy but were already in the Draft of the Hungarian Treaty,[1] seem to have been interpreted by the former Hungarian Government as presupposing an express transfer of the assets by the Control Council which, being subject to the unanimity rule, has failed to make any transfer. On the other hand, the Soviet contention would appear to have been that no transfer by the Control Council was required, because German assets in Hungary had been allocated to the Soviet Union by the Potsdam Conference.[2] This argument does not carry conviction: the Potsdam Conference merely established, as between the three participants, the principle of allocating German assets in Hungary to the U.S.S.R.; the definition of such assets was left open; it was only by the subsequent Peace Treaty that the Soviet Union agreed to take those assets which, by virtue of Control Council Law No. 5,[3] had come under the control of the four Commanders-in-Chief in Berlin and which were to be designated and released by them. Moreover, the Soviet interpretation would in numerous cases be inconsistent with Articles 26 and 27 of the Peace Treaty with Hungary. In short, these Articles provide for the restoration and return of, and in certain cases for compensation in respect of, all legal rights and interests in Hungary as at 1 September 1939 of the United Nations and their nationals and of persons under Hungarian jurisdiction who have been 'the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons'. It is clear that, if such property was, for example, confiscated by the Germans so as to become formally a 'German asset' and is to be restored to United Nations nationals, it cannot at the same time be available to the Soviet Union as a German asset.

The views of the United States Government on the subject of transfer to the Soviet Union of German assets in Hungary, Bulgaria, and Roumania were expressed in a Note which the United States Ambassador handed to the Soviet Minister for Foreign Affairs on 29 July 1947 and which stated, *inter alia*, that 'the United States Government can recognize only transfers made in accordance with treaty terms, which is to say, as provided by the Control Council for Germany', that 'Austrian assets in these countries cannot be considered German', and that 'as a general principle beneficial rights of the United Nations countries in any German assets are not to be transferred'.[1] As between the Soviet Union and Hungary the problem seems to have been settled by an Agreement made in December 1947 whereby Hungary undertook to pay to the Soviet Union $45,000,000 in settlement of the former 'German assets'.[2] It would not be surprising if the other Allies regarded this Agreement as inconsistent with the terms of the Treaty.

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[1] Cmd. 6894, Art. 24.

[2] See above, p. 239.

[3] See above, p. 239.

As regards German assets in Eastern Austria,[3] the Soviet Union seems to have taken a similar position: the Potsdam Conference not only established a principle as between the three participants, but conferred the complete legal title upon the U.S.S.R. In the summer of 1946 the Supreme Commander of the Soviet Occupation Troops in Austria in fact issued an Order 'in accordance with the decisions of the Berlin Conference of the three powers' and decreed that 'German property located in Eastern Austria which belonged to the German Reich, to German firms, societies, organisations and any other physical or juridical persons have passed into the possession of the U.S.S.R. as German reparations'.[4] The Soviet definition of the term 'German asset' is purely formal: thus on 2 August 1947 the Soviet Union took possession of an oil refinery at Lobau which had been taken over by the German invaders but was formerly owned by United States and British interests; on 10 September 1947 the Austrian Government protested in a Note to the Soviet delegate on the Austrian Control Commission against confiscation by the Soviet Union of the firm of Brown Boveri which, before the *Anschluss*, was allegedly owned by the Austrian National Bank, but which had been sold under duress to the Germans.[5]

The attitude of the other Powers continues to differ from that of the Soviet Union and thus there has arisen, as Mr. Marshall has said,[6] 'one of the principal obstacles in the way of further progress on the Austrian Treaty'. The Deputies of the Foreign Ministers who met in London from 14 January to 25 February 1947 included the problem in the list of 'disagreed questions' which were to be discussed at the Moscow Conference of the Foreign Secretaries. The Moscow Conference (10 March to 24 April 1947) devoted a great deal of time to the point. The United States delegation repeatedly emphasized the necessity for a clear definition and for a consideration of the influence of Austrian law. In a formal Statement Mr. Marshall said:[7]

> 'we do not admit that title to German assets has already passed.... We believe ... that

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[1] *Department of State Bulletin*, No. 423, 17 (1947), p. 298.

[2] *The Times* newspaper, 13 December 1947.

[3] See, generally, a Note in *International Law Quarterly*, 1 (1947), 345.

[4] *Department of State Bulletin*, No. 368, 15 (1946), p. 123.

[5] See *Chronology of International Events and Documents*.

[6] *Department of State Bulletin*, No. 404, 16 (1947), p. 571.

[7] 27 March 1947: ibid. No. 406, 16 (1947), p. 653.

> in some instances there have been erroneously included in the definition of German assets property which is really Austrian and which was taken away from the Austrians by the Germans after the Anschluss by force or duress, and other property belonging to United Nations and their nationals. In our view none of the Allies intended at Potsdam to transfer title to German assets which were taken from the victims of Nazi aggression and which justice and equity demand be returned to them.'

The French delegation proposed to take care of part of the problem by excluding from the Soviet title 'all property wrongfully taken from United Nations nationals or from Austrian nationals for racial, religious or political reasons'. The Soviet delegation, however, was unable to accept this, or an American definition according to which German assets were 'property, rights and interests beneficially owned on May 8, 1945, by the German Government or German nationals which were owned by them on March 12, 1938, or acquired later by the German Government or by persons who, on March 12, 1938, were German nationals, if such assets were acquired without force or duress'. The result was that the Foreign Secretaries agreed to disagree and to refer the problem to a Commission of Representatives of the Four Powers. This Commission commenced its meetings in Vienna on 12 May, and remained in session until 9 October 1947. It does not seem to have been able to produce any result, except that the Soviet Union modified their attitude to some extent. While in Moscow the Soviet Union eventually gave up their claim to property taken by 'direct forcible action', they agreed in Vienna that there should be excluded property for which the original owner had received compensation, if the compensation had been used for the payment of special taxes or other charges, but they continued to insist that for a sale to be due to 'direct forcible action' it must be the result of a direct personal approach to the owner—a formula which would not include sales made in anticipation of threatened direct forcible action and would allow the Soviet authorities to remain in control of the greater part of the 209 enterprises taken over by them in Eastern Austria.[1]

The Western Allies. On 14 January 1946, in Paris, the Western Allies[2] made an 'Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparations Agency and on the Restitution of Monetary Gold'.[3] The principal object of the Agreement was to allocate a proportionate share of the total assets to each of the eighteen nations and to lay down rules for charging to the reparation share of every member Government the value of all German assets received by that Government as reparation.[1] Article 6 deals with German external assets and imposes upon each signatory Government the duty that it

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[1] On the foregoing see a pamphlet, *The Austrian Treaty*, published by the Union of Democratic Control in October 1947.

[2] Albania, Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, South Africa, the United Kingdom, United States, and Yugoslavia. The term 'Western Allies' is perhaps not quite appropriate, but is, it is hoped, permissible.

[3] Cmd. 7173.

'shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets (net of accrued taxes, liens, expenses of administration, other in rem charges against specific items and legitimate contract claims against the German former owners of such assets).'

The Agreement is not very informative on the vexed question of definition. The term 'German enemy assets' is an unusual one. A Committee of Experts in matters of enemy property custodianship will have to 'overcome practical difficulties of law and interpretation' (paragraph F). According to paragraph E the Agreement shall extend to assets 'which are in reality German enemy assets, despite the fact that the nominal owner of such assets is not a German enemy'; but the converse case of property which is in reality Allied, though the nominal owner is a German, has not been expressly dealt with. A serious doubt arises from paragraph D which, in English and French, reads as follows:

In applying the provisions of paragraph A above, assets which were the property of a country which is a member of the United Nations or its nationals who were not nationals of Germany at the time of the occupation or annexation of this country by Germany, or of its entry into war, shall not be charged to its reparation account. It is understood that this provision in no way prejudges any questions which may arise as regards assets which were not the property of a national of the country concerned at the time of the latter's occupation or annexation by Germany or of its entry into war.

Dans l'application des dispositions du paragraphe A ci-dessus, les avoirs qui étaient la propriété d'un pays membre des Nations Unies ou d'une personne ressortissant de ce pays et non de l'Allemagne au moment de l'annexion ou de l'occupation de ce pays par l'Allemagne ou de son entrée en guerre, ne seront pas imputés à son compte de réparations, étant entendu que la disposition qui précède ne préjuge aucune des questions qui pourraient se poser au sujet d'avoirs qui n'étaient pas la propriété d'un ressortissant du pays en question au moment de l'annexion ou de l'occupation de ce pays par l'Allemagne ou de son entrée en guerre.

In the English text the words 'at the time of the occupation or annexation of this country by Germany, or of its entry into war' connect with 'who were not nationals of Germany'; the French text makes it fairly clear that ownership, rather than nationality, at the time of the occupation, annexation, or entry into war is decisive. This, it is believed, is the better interpretation of the text, both versions of which are equally authentic. Its effect would be as follows: if in 1939 a Dutchman owned a house which during the occupation came into the ownership of a German, such property does not count as German for the purpose of inter-Allied accounting; the converse case of a house owned by a German in 1939, but acquired by a Dutchman during the occupation, is left open.

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[1] See Howard, 'The Inter-Allied Reparation Agency', in *Department of State Bulletin*, No. 364, 14 (1946), p. 1063.

As to German patents, a Conference was held in London from 15 to 27 July 1946 in which most of the Governments who are members of the Inter-Allied Reparation Agency participated.[1] The Accord[2] reached by the Conference provides that 'all former wholly German-owned patents' shall be dedicated to the public (Art. 1), subject to the protection of interests lawfully granted before 1 August 1946 to or acquired by a non-German (Art. 4). Each Government shall be at liberty to treat 'as non-German-owned those patents or interests in patents belonging to persons in special classes (such as Germans residing outside Germany, German refugees, etc.) whose property that Government has exempted or may in the future exempt from its general law and regulations relating to German-owned property' (Art. 5). The Accord does not in any way define 'ownership' so that, for example, the position of a non-German beneficial owner of a patent standing in the name of a German is doubtful.

It should be added that, in so far as can at present be ascertained, none of the Western Allies has as yet issued any regulations implementing the Paris Agreement on Reparation from Germany or the London Accord on patents. This is particularly so in England, where the authorities seem to take the view that for the decision of numerous questions the terms of the Treaty of Peace with Germany must be awaited and that, in the meantime, the Trading with the Enemy Act, 1939, and the numerous Orders issued under it govern all points that arise. Under that Act the British Government has, it is true, power to comply with the duty imposed upon it by Article 6 of the Paris Agreement and, generally, its powers are sufficiently wide and elastic to give effect to whatever policy may be decided upon in the absence of a Treaty of Peace. Yet the curious fact remains that the situation prevailing in England is much less settled than that created in Italy (or in Switzerland and Sweden) as a result of the Agreements discussed in this paper. These Agreements apply to the property of Germans in Germany. The Trading with the Enemy Act, 1939, confers on the Board of Trade powers (including the power to vest property and to direct the sale of property so vested) in regard to the property of both enemies in the territorial sense and enemy subjects; in other words, the British legislation affects, or may affect, a non-German in Germany as well as a German outside Germany.

Many problems, however, would be clarified if the 'Agreement relating to the Resolution of Conflicting Claims to German Enemy Assets', signed in Brussels on 5 December 1947 by Canada, the Netherlands, and the

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[1] Australia, Belgium, Canada, Czechoslovakia, Denmark, France, Luxembourg, the Netherlands, Norway, South Africa, the United Kingdom, and the United States of America.

[2] *Department of State Bulletin*, No. 372, 15 (1946), p. 300, also available at the Patent Office in London.

United States of America,[1] became effective and would be joined by other members of the Inter-Allied Reparation Agency. For a long time it has been evident that the liquidation of German external assets is greatly impeded by the existence of conflicting claims made by the Custodians of Enemy Property of various countries against each other.[2] The Brussels Agreement aims at settling these claims in a generally acceptable manner and so as to 'avoid the vexatious and lengthy litigation and negotiations which took place after the first World War'.[3] The Agreement, which, incidentally, does not define the terms 'German Enemy Assets' or 'German enemy', is divided into six parts. The first part deals with such property of a 'German enemy' as securities, currency, negotiable instruments, bills of lading, and so forth that are held in one country, but issued in another, and allocates it to the various interested countries; e.g. securities and currency go to the country of issue, while negotiable instruments go to the country where the principal debtor resides, and bills of lading belong to the country where the property is situate (Arts. 1 to 6). Part II establishes the rule that a deceased's estate or a trust shall, except in so far as immovables are concerned, not be retained on the ground that a 'German enemy' has an interest, whether as beneficiary or creditor, but shall be released to the country where the deceased was domiciled or the trust is administered (Arts. 7 to 10). Part III is of particular importance: a corporation, organized in an Allied country, X, is 'German controlled', i.e. German enemies hold directly or indirectly not less than 50 per cent. of the voting rights or shares or control the management. The corporation owns property in another Allied country, Y. Such property is to be released by country Y which, however, 'shall be entitled to receive reimbursement from [country X] in an amount representing that portion of the value of the property in [country Y] which corresponds to the percentage of direct and indirect German enemy interest'. This principle, which is elaborated and also made subject to a number of exceptions by Articles 11 to 20, is being applied, in a modified form, by Part IV in regard to property situate in Allied territory of enterprises organized under the laws of Germany: if a signatory Government sponsors the claim made by persons who were non-enemy nationals on 1 September 1939 and who at that date owned not less than 25 per cent. of the shares in or controlled the enterprise, then the property of the enterprise is to be released 'to the extent of those [non-enemy] interests' (Arts. 21 to 25). In this connexion it must be mentioned that, according to Article 27 (A) (ii), a non-enemy national will continue to be treated as the owner of his interest in the German enterprise notwithstanding any transfer to 'German enemies' which at any time was 'forced without adequate consideration by action of the Government of Germany'. The provisions of Parts III and IV involve an effective piercing of the corporate veil and thus introduce an important new principle. They are said to 'carry out the established policy of the Department of State of protecting the interests of United States nationals in assets outside Germany owned either by a corporation in which there is a German interest or by a corporation organized under the laws of Germany'.[1]

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[1] *Department of State Bulletin*, No. 444, 18 (1948), p. 6, with an introductory article by Maurer and Simsarian, ibid., p. 3.

[2] See Meyer, *Journal of Comparative Legislation*, 3rd series, 26 (1944), p. 51.

[3] Maurer and Simsarian, loc. cit.

Parts V and VI of the Agreement deal with 'Interpretation and Application' and 'Conciliation' respectively. It is a significant aspect of modern tendencies that the Agreement not only aims at avoiding litigation, but also makes express provision for cases in which release is demanded while proceedings are pending or in which, after release, a judicial decision adverse to administrative ruling is given. If the recipient Government, as a result of litigation, becomes bound to hand over property to a litigant and thus to 'surrender custodian control', the releasing Government 'may reassert its custodian control over the property in order to make an independent test of the litigated issue' [*sic*], but if the releasing Government has to hand over the property to a litigant, such Government may reassert control only 'in order to comply with the obligation imposed by the litigation'.

Italy. By Article 77 (5) of the Treaty of Peace Italy has agreed 'to take all necessary measures to facilitate such transfers of German assets in Italy as may be determined by those of the Powers occupying Germany which are empowered to dispose of the said assets'. These Powers are the United States, France, and the United Kingdom, who, on 14 August 1947, entered into an Agreement with Italy[2] for the disposal of German assets. Italy will promptly sell or liquidate

> 'all assets in Italy belonging directly or indirectly to
> (*a*) German individuals in Germany or corporations or other organizations organized under the laws of Germany;
> (*b*) the German state and German municipalities and state, federal, municipal or other governmental authorities;
> (*c*) German Nazi organizations;
> (*d*) German individuals already repatriated or to be repatriated to Germany.'

On the other hand, the Agreement does not extend to

> (*a*) assets of individuals deprived of life or substantially deprived of liberty pursuant to any law, decree or regulation discriminating against political, racial or religious groups;
> (*b*) assets belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes;

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[1] Maurer and Simsarian, loc. cit., p. 4.

[2] *Department of State Bulletin*, No. 425, 17 (1947), p. 388; Cmd. 7223.

(*c*) assets of a corporation or any other organization organized under the laws of Germany to the extent that they are not beneficially German-owned;
(*d*) assets released under an intercustodial agreement;
(*e*) assets coming within the jurisdiction of Italy as a result of resumption of trade with Germany.

The term 'assets' is given a wide definition in Annex 1, but does not include patents or trade-marks. Liquidation by the Italian Government will be carried out in collaboration with a committee consisting of representatives of the four Governments who are empowered to arbitrate in matters concerning the interpretation and execution of the Agreement.[1]

The Neutrals. By Article 6 (B) of the Paris Agreement on Reparation[2] the Western Allies agreed that 'German assets in those countries which remained neutral in the war against Germany shall be removed from German ownership or control and liquidated or disposed of in accordance with the authority of France, the United Kingdom and the United States of America, pursuant to arrangements to be negotiated with the neutrals by these countries'. Negotiations initiated with Spain and Portugal towards the end of 1945 have not yet yielded a result. An Agreement with Switzerland[3] was concluded on 25 May 1946 in Washington. Its terms were shortly reviewed last year,[4] and since the Swiss regulations implementing it have not yet appeared[5] it is sufficient to summarize it for the purposes of this paper. According to the Agreement the Swiss Compensation Office, in close co-operation with a Joint Commission composed of representatives of the Governments of France, the United States, Great Britain, and Switzerland, will liquidate property in Switzerland 'owned or controlled by Germans in Germany'. The term 'property' includes 'all property of every kind and description and every right or interest of whatever nature in property acquired before the first of January, 1948'. 'Germans in Germany' are 'all natural persons resident in Germany and all juridical persons constituted or having a place of business[6] or otherwise organised in Germany other than those organizations of whatever nature the ownership or control of which is held by persons who are not of German nationality'. Interests in Switzerland which German nationals resident in Germany have through such organizations will be liquidated; on the other hand,

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[1] The Agreement does not protect the property of women of Italian birth married to Germans and residing in Germany, although the Agreement with Switzerland provides for such protection (see below, p. 254).

[2] See above, p. 243.

[3] Cmd. 6884; *Department of State Bulletin*, No. 365, 14 (1946), p. 121.

[4] See Mann, 'German Property in Switzerland', in this *Year Book*, 23 (1946), pp. 354–8.

[5] It seems that from many points of view the drafting of these regulations led to grave difficulties. This is readily understandable.

[6] This would include the Swiss property of a Spanish company which has a place of business in Germany. It has been pointed out by Mann, loc. cit., that the definition includes non-German natural persons, though it is intended to safeguard their 'substantial interests'.

'substantial interests of non-German persons which would otherwise be liquidated' are to be safeguarded. Germans who have been or are liable to be repatriated from Switzerland before 1 January 1948 are treated as 'Germans in Germany'. No exception has been made for victims of Nazi persecution, but it is intended to save from liquidation the property of women of Swiss birth married to Germans and residing in Germany.

The Agreement contains fairly detailed provisions for the review of decisions of the Compensation Office by a Swiss Authority of Review and, in the last resort, by an Arbitral Tribunal. The German owners are to be indemnified in German money for the loss of the liquidated property.

On 18 July 1946 the Governments of the United States, France, and the United Kingdom concluded an 'Understanding' with Sweden on German External Assets, Looted Gold and Related Matters.[1] It took the unusual form of an exchange of no less than sixteen letters. Their financial effect is that Sweden will not only return the gold looted by the Germans, but will also pay about 75 per cent. of the total[2] of the German assets in Sweden, viz. 50 million kronor, to the Inter-governmental Committee on Refugees, 75 million kronor for allocation among the signatories of the Paris Agreement on Reparation 'for reconstruction and rehabilitation work', and 150 million kronor for financing purchases for the German economy.[3] The background of the Agreement with Sweden has been described in an illuminating article by Mr. Seymour J. Rubin, the Chief of the Delegation of the United States.[4] He makes it clear that Sweden was in a position to strike a much harder bargain than the Swiss: in the result she achieved a compromise which left her a considerable amount of latitude and independence.

The Allies seem to have advanced two different arguments in support of their claims against Sweden. In the first place, they relied on their legal rights: they had the authority of the Allied Control Council for Germany, 'the governing body in Germany'; the validity of the Control Council's legislation in respect of external assets was unquestionable; 'under principles of comity' the country where such assets are situate should allow extra-territorial effect to such legislation, 'in the absence of compelling reasons of public policy to the contrary and the presence of sound reasons in the reparation concept to the affirmative'. It was the third branch of this argument in particular which the Swedish delegation was unable to accept, so that it became necessary to arrive at a compromise 'shaped in such a manner as to avoid the determination of the legal issues in favor of either the Allies or Sweden'. Its guiding principles were that supervision by the Allies was eliminated, but that Sweden would give effect to the tenets of Allied policy which, in the interest of world security, require the exclusion of Germany from uncontrolled activities abroad, and, in the interest of fairness, demand that a German who happens to have property in Sweden should not be in a better position than he would be in if his property were situate in Germany where it would be liable to be taken as reparation.

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[1] Cmd. 7241; *Department of State Bulletin*, No. 421, 17 (1947), p. 162.

[2] Estimated at $105,310,800 or 378 million kronor.

[3] The sum of 275 million kronor equals about 77 million dollars. Sweden attached importance to the idea that she was contributing to reconstruction and rehabilitation rather than to reparation.

[4] *Department of State Bulletin*, No. 421, 17 (1947), p. 155.

Accordingly, the Swedish Foreign Capital Control Office will 'continue to uncover, take into control, liquidate, sell or transfer German property' except the rolling-stock and accessories of the German State Railways,[1] property of the German State,[2] patents,[3] trade-marks, and copyrights.[4] The Allies, who declared themselves to be acting for the other signatories of the Paris Agreement on Reparation, undertook that the German owners would be indemnified in German money and that they would 'require Germany or the future Government of Germany to confirm the provisions of the present understanding'. Sales will be made to non-German nationals only. Divergencies in the interpretation and scope of the 'Understanding' will be submitted to arbitration.

'German property' has been defined in the 'Understanding' as including 'all property owned or controlled, directly or indirectly, by any person or legal entity of German nationality inside of Germany, or subject to repatriation to Germany, other than persons whose case merits exceptional treatment'. The last words are probably intended to apply to victims of Nazi persecution; in this connexion the Swedish delegation undertook to recommend to its Government that steps should be taken 'with a view to putting at the disposal of the three Allied Governments for purposes of relief the proceeds of property found in Sweden which belongs to victims of Nazi action who have died without heirs'—a matter not dealt with in any other agreement.

Sweden has secured a further concession in that, in the case of sale or liquidation, 'the interests of non-German foreign nationals will be protected to the same extent and in the same manner, whether direct or indirect interests are involved, as those of Swedish nationals, on condition of reciprocal treatment in the country of those nationals'. The recognition of reciprocity in this respect is peculiar to the Agreement with Sweden.

The problem of draftsmanship. The conclusions on the art of drafting international agreements which a lawyer must draw from the preceding survey are not inspiring. It is probably no exaggeration to describe the story told in this paper as a tragedy of drafting. From the legal point of view the original sin was committed at Potsdam, where it was decided to refrain either from working out a clear policy or from giving clear expression to such policy as was agreed upon. Probably the former explanation is correct, because already at Potsdam it was apparent that the Soviet representatives were treating as German all property that the Germans had wrongfully vested in themselves.[1] Not all the subsequent events, however, can be attributed to these failures. Where the Treaties of Peace with the satellite countries speak of enemy (Italian, Hungarian, &c.) property in Allied countries, and even where they speak of the property of United Nations nationals in enemy countries, they leave many questions (to some extent identical with those mentioned in this paper) obscure and thus create gaps which cannot be filled with any degree of ease or any hope of uniformity. Moreover, even the Agreements made by the Western Allies alone, for instance those relating to German External Assets in Switzerland, Sweden, and Italy, do not disclose a predetermined and consistent policy and are, from the viewpoint of legal drafting, far from perfect. No book of international forms and precedents, nor an International Legislative Drafting Bureau, such as has been proposed by Mr. Jenks,[2] would have been required to establish a measure of harmony. The Treaty of Versailles of 1919 and the experience of its working, together with the practice which grew up around it, could have provided much useful guidance, though its text was certainly not free from defects. An unassisted but systematic inquiry into the problems involved could have led to a formula entitled to overall authority.

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[1] Sweden promised to give 'favourable consideration' to the suggestion that such stock should be put at the disposal of the Allied authorities in Germany.

[2] Claims in respect of such property were reserved.

[3] They will not be sold for a defined period.

[4] It is apparently intended that Sweden should adhere to an international convention on these matters.

By and large, the most satisfactory text of all those discussed above is probably that of the Agreement with Italy. It seems to have been so designed as to take care of many problems ignored by the other texts. It would lead too far, if it were attempted by way of a commentary, to indicate all the doubts which arise in the case of each Agreement. It must suffice to take the Agreement with Italy as a basis for discussion, to compare it to some extent with the other Agreements, and to mention some very few of the questions to which this relatively good text gives rise and which a more elaborate text could, and ought to, have clarified.

(1) In so far as the property of individuals is concerned, the Agreement with Italy (as well as that with Sweden) stipulates two requirements, viz. the owner must be a German national and must be resident in Germany. In neither connexion has anything been said about the date at which these

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[1] See Byrnes, *Speaking Frankly*, pp. 75–6 of the English edition.

[2] See *American Journal of International Law*, 39 (1945), p. 163.

conditions must exist; nor does the Agreement follow the Agreement with Switzerland in specifying the date by which the property must have been acquired. Does, then, the Agreement speak from the date when it was concluded, or from the date when the Treaty of Peace was made or when it came into force, or from the date of the Potsdam Declaration or of Control Council Law No. 5? The point is of importance not only in cases of death, marriage, or change of residence and so forth, but also because as a result of the territorial expansion of Germany during the Nazi régime and the transfer of German populations in eastern countries to Germany since the end of hostilities there are now in Germany many persons whose German nationality is doubtful: they may be Germans in fact, but not in law, or they may be Germans under German law but have become Germans in a manner inconsistent with Allied conceptions, so that in truth they are perhaps stateless. The texts of the Agreements at hand are so vague that it is almost impossible to suggest a solution; perhaps the safest course is to assume that the date of the Agreements is decisive and that those persons are Germans within their meaning who at that date were Germans under German law applied under the authority of the Control Council.

(2) The Agreement with Italy speaks of assets 'belonging directly or indirectly' to Germans. It would seem, therefore, that assets held by a Swiss nominee for a German fall within the ambit of the Agreement. But the converse case of property held by a German nominee for a Swiss has not been dealt with. In such a case the property belongs directly to a German and is, consequently, prima facie covered by the Agreement. Yet it is difficult to believe that such was the intention of its authors.

In the case of the Agreement with Sweden, it is true, the clause which provides for the protection of non-German interests on the basis of reciprocity may afford some remedy, but in connexion with the Swiss Agreement the point is much more doubtful, since it speaks only of 'taking into reasonable account the national interests of the signatory Governments and those of the Swiss economy' for the purpose of settling 'the terms and conditions of sales of German property'. As to the Agreement with Italy, it is even possible to derive an *argumentum e contrario* from the clause according to which assets of a German *corporation* which are not beneficially German-owned are exempted (see below, p. 254). However, the practice which developed around the Treaty of Versailles in a certain measure tended to interpret its corresponding provisions in the broad sense that they were directed against property that was German in fact rather than in law. It is perhaps not impossible that this practice (the details of which cannot be traced within the limits of these observations) will supply useful guidance in the future.

(3) When the Potsdam Declaration or the Treaties of Peace speak of 'German property', they do not in any way define how the nationality of a corporation owning property in the country concerned is to be ascertained. The Agreements made in implementation of those documents have adopted more than one solution.

The Agreement with Italy plainly follows the Anglo-American doctrine according to which a company has the nationality of the country where it is incorporated.[1] A company incorporated in Germany is, therefore, caught by the Agreement and prima facie it is irrelevant that its *siège social* or its centres of exploitation or of management and control are situate outside Germany. The question arises whether some adjustment has been introduced by the provision which excludes from the scope of the Agreement assets of a German corporation 'to the extent that they are not beneficially German-owned'.[2] These words, it is submitted, clarify in the case of corporations a contingency which in the case of individual owners was ignored:[3] if a German corporation is a trustee for a Swiss in respect of property situate in Italy, this is not property to which the Agreement extends. But those words cannot be given such wide meaning as to enable a company's shareholders to claim title to property owned by the corporation. It is well established in both municipal and international law that shareholders have no legal or beneficial title to corporate assets,[4] and the use of the word 'German-*owned*' negatives any intention to depart from this rule; even the assets of a wholly owned subsidiary company cannot, therefore, be said to be beneficially owned by the parent company or its shareholders.[5] It follows that Allied shareholders of a German company have no rights whatever in respect of the company's Italian assets.[6]

While the result is the same under the Agreement with Sweden,[7] it is different in the case of the Swiss Agreement. This applies to property owned or controlled by corporations organized in Germany, provided that such corporations are not owned or controlled by non-Germans.

If a company incorporated outside Germany, for example, in Spain, has property in Switzerland, Sweden, or Italy and is controlled by Germans in

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[1] See, for example, Farnsworth, *The Residence and Domicil of Corporations*, pp. 298 ff.

[2] A similar question arises under Art. 6 (F) of the Paris Agreement on Reparation; see above, p. 244.

[3] See above, p. 252.

[4] For the international practice see the *Standard Oil Company Tankers Case*, *American Journal of International Law*, 22 (1928), p. 404.

[5] The use of the word 'indirectly' does not help: it refers to assets indirectly belonging to Germans, not to assets indirectly belonging to non-Germans.

[6] It should be clear beyond doubt that, if a German holds shares in an Italian company, his shareholding may be liquidated, but not even a fractional part of the corporate assets can be said to be indirectly German-owned: see decision of the Swiss Federal Tribunal of 1 April 1924 (*Clunet*, 1924, p. 785); but see decision of the Cass. Civ. of 2 February 1925 (*Sirey*, 1925, Part I, p. 225).

[7] Unless the clause affording protection to non-German interests on the basis of reciprocity gives protection.

Germany, then the property is in all three countries subject to liquidation: in Switzerland and Sweden, because the property is controlled by Germans; in Italy, because the property is indirectly owned by Germans.

(4) A curious uncertainty arises in connexion with the property of persons of German nationality who have been or will be repatriated. Such property is included in the Agreements with Switzerland, Sweden, and Italy, though the owners are not resident in Germany. Who are the persons affected? Does, for example, the Agreement with Italy apply only to Germans repatriated from Italy or also to Germans repatriated from Switzerland, Spain, or the United States? It is submitted that the place of the repatriated person's residence is irrelevant. The Agreement is made to implement Article 77 (5) of the Treaty of Peace which applies indiscriminately to 'German assets'. It is only the Agreement that exempts assets of Germans resident outside Germany, but it does not extend the benefit of the exemption to repatriated Germans. In so far as the latter are concerned it must therefore be inferred that the Agreement returns to the rule established by the Treaty of Peace and that the assets of repatriated Germans are included in the Agreement irrespective of the country whence they are repatriated.

The point is more doubtful in connexion with the Swiss and Swedish Agreements, which are not made in pursuance of an earlier treaty. Since the texts do not contain any words of limitation, but refer quite generally to repatriated persons, the result is probably the same. It is noteworthy, however, that the Swiss Agreement contains the qualification, absent in the other Agreements, that a repatriated person's assets are subject to liquidation only if repatriation is effected or ordered before 1 January 1948.

(5) Neither the Treaty of Peace nor the Agreement with Italy mentions in any way the rights of creditors or mortgagees who have claims in respect of the 'German assets' involved. What are the rights of an Italian creditor of a German debtor who has property in Italy, or of an Italian or Swiss who has the security of a mortgage or charge on a 'German asset' in Italy? The Agreement with Sweden accords protection to non-German interests on the basis of reciprocity and perhaps a similar position obtains under the Swiss Agreement,[1] but the Paris Agreement on Reparation contains the fullest provision by making 'German enemy assets' subject to the deduction of 'accrued taxes, liens, expenses of administration, other in rem charges against specific items and legitimate contract claims'.[2] The omission of a similar clause from the Italian Agreement renders it possible that 'German assets' cease to serve as an effective security or, in other words, that the

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[1] See II (F) of the Annex.

[2] On the effect of this clause see Nadelmann in *American Journal of International Law*, 40 (1946), p. 813.

security is overreached by Italy's right and duty of liquidation. Yet it is believed that such a result would be inconsistent with the meaning which the word 'asset' has in this particular context and which may be said to connote something that is free from deduction, i.e. net.

(6) The special case of the victims of Nazi persecution, ignored by the Swiss Agreement, adequately mentioned in the Swedish Agreement, and fully dealt with in the Italian Agreement, may become the principal occasion for discussing a problem of a general character. Suppose a German has acquired Italian property from a member of one of the privileged groups of Germans or from a non-German in circumstances which entitle the former owner to restitution—can the property be described as a German asset? In so far as the property of United Nations nationals and transfers after 10 June 1940 are concerned, Article 78 of the Treaty of Peace with Italy clearly overrides all other provisions. In other cases very fine distinctions will have to be made between acquisitions which were void *ab initio*, voidable, or merely subject to statutory rules of restitution—a matter greatly complicated by the fact that, with the exception of the case of Switzerland, no Agreement specifies the date at which the property is required to be German.

The Rule of International Law. There cannot be any doubt that, from the point of view of political expediency, Allied policy relating to German external assets is fully justifiable: the enormous damage done by Germany, her inability to pay indemnities, the risk of external property being abused so as to become the nucleus of economic infiltration and, consequently, of threats to the peace of the world—these and similar considerations cannot but support the policy of depriving Germany of her foreign assets. Indeed, countries like Switzerland and Sweden never failed to admit their force. To the strictly legal mind, however, scruples are bound to occur. If it is assumed that the war (in the international sense) has ended, and if it is further assumed that the Allied Control Council is the Government of Germany,[1] then, it is true, the attitude of the Allies cannot be criticized on the ground that it infringes rules of neutrality or the alleged maxim that private enemy property is inviolable; for those assumptions would open the way to the irrefutable argument that the Government of Germany is free to make contractual arrangements with other countries. But even on this basis there remain at least four points which must give rise to uneasiness.

In the first place, the Agreements with neutrals, at any rate, involve an extension of the effect of local confiscations which is hardly reconcilable with traditional thought. In the last resort, a choice between values has to be made: is it preferable to give overriding effect to the political considerations mentioned above and, for this purpose, to take German property in neutral countries, or to sacrifice this political aim for the sake of the principle that confiscation has no extra-territorially recognizable impact? This is a question to which a lawyer can contribute but little.[1]

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[1] On these assumptions see *International Law Quarterly*, 1 (1947), pp. 314 ff.; on their effect see this *Year Book*, 23 (1946), pp. 354, 355. But see Jennings and Fawcett, ibid., at pp. 123 and 381 respectively, from whose point of view the Agreements made with the neutrals are bound to raise grave problems.

A second point to be noted is that the compensation payable to owners is left wholly uncertain. Neither the Potsdam Declaration nor the Treaties of Peace nor the Paris Agreement on Reparation mentions it in any way. The Agreements with Switzerland and Sweden contain positive statements that the owners will be indemnified in Germany in Reichsmarks. It is unnecessary to ask when and on what basis such compensation will be paid and whether it will be real or illusory, or to examine, adopt, and draw an analogy from, the argument of an American writer[2] who said that, though the Treaty of Versailles imposed on Germany a duty to compensate, economic events 'caused Germany to repay many of these claims with paper money which meant actual confiscation'. It is sufficient to remind the reader of Article V of Control Council Law No. 5, according to which the question of compensation for property vested under the law 'will be decided at such time and in such manner as the Control Council may in the future determine'. This is the German law. It has not been altered and cannot at present be altered by the representatives of the United States, France, and the United Kingdom alone. In the Agreements with Switzerland and Sweden these countries, therefore, have undertaken to do something that they cannot do in Germany as a whole and that they ought not to do in their respective zones of occupation.

Thirdly, the lawyer will confess to that uncomfortable feeling which he always has in the face of an actual or even remotely possible conflict of interests. When concluding their Agreements the three Western Allies necessarily, and professedly, acted as the Government of Germany.[3] At the same time they acted in their own interest.[4] Even for those who are not experts in equity law the mere allusion to this point will be sufficient to provoke concern at the quagmire in which they find themselves. The

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[1] On the question of the extra-territorial effect of confiscatory legislation see the Note by Mann in this *Year Book*, 23 (1946), pp. 354–8.

[2] Gathings, *International Law and American Treatment of Alien Enemy Property*, pp. 113, 114. The author belongs to that substantial group of scholars who have argued in favour of the inviolability of private enemy property and among whom J. B. Moore and Professor Borchard are outstanding. The material has recently been collected by Sommerich, 'A Brief against Confiscation', in *Law and Contemporary Problems: Enemy Property*, 11 (1945), p. 152. Against this view see Rubin, 'Inviolability of Enemy Private Property', ibid., p. 166. Not all of the literature on this subject is free from special pleading.

[3] The absence of Soviet participation is readily explicable in view of the terms of the Potsdam Declaration, but renders it a little doubtful whether in law the three Western Allies really could act as the Government of Germany as such, though they had authority to act on its behalf.

[4] And in that of the other signatories of the Paris Agreement on Reparation.

Swedes seem to have shared this feeling strongly, as is shown by their insistence on a clause according to which the three Western Allies will in due time 'require Germany or the future German Government' to confirm the provisions of the 'Understanding' reached in July 1946.

Fourthly, it must be a matter for regret that the Agreements made after World War II almost completely ignore the problem of legal remedies. The Agreement with Switzerland allows a right of appeal against decisions of the Compensation Office not only to the Joint Commission, but also to 'all interested private persons', though the further appeal to the Arbitral Tribunal is open only to the three Allied Governments. Nothing similar is contained in the other Agreements. It is conceivable that the regulations to be issued in each country will take care of this point. For many reasons, however, it would have been desirable to deal with it on an international level. To mention only one of them, it must appear doubtful whether a German owner whose rights, titles, and interests are vested in the German External Property Commission under Control Council Law No. 5 has any *locus standi* where his property outside Germany is concerned. If, for instance, the owner wishes to argue that at such date as may be material under the Agreement with Italy he was not resident in Germany and that, therefore, his property is not subject to liquidation, will he be met with the answer that he belongs to that category of Germans whose property Law No. 5 purports to vest notwithstanding his residence abroad? Or suppose that an owner resident at all times in Germany wishes to submit that property in Switzerland was acquired after 1 January 1948, and after the effective date of Law No. 5,[1] what guarantees of a hearing are given? It may be objected that these are technicalities or matters of unimportant detail. However, the liability of private enemy property, even if situate in neutral countries, to seizure and liquidation may well become accepted not as a regrettable exception but as a rule conforming to modern thought and conscience. In view of this it seems essential that such a development should be accompanied by the elaboration of adequate legal machinery.

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[1] It is possible (though unlikely) that Law No. 5 will be construed as applying only to property belonging to a German at the date when it came into force, i.e. 30 October 1945.

PIRATA NON MUTAT DOMINIUM

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I. *Piracy as robbery*

THE purpose of the present article is to consider some of the consequences of piracy in relation to the title to property—a matter which is not without practical interest to public and private lawyers alike.[1] To take away a man's property without legitimate authority is mere robbery; the legal title of the owner of property so taken will be unaffected, and the act will therefore logically give rise to a claim for restitution or, failing specific restitution, for compensation by the pirate or robber for the loss suffered.[2] A pirate is *hostis humani generis*, punishable by any state. The essence of piracy is that the act is done without state authority and without any other legal justification. In *Geyer* v. *Aguilar* (1798), 7 T.R. 681, 101 E.R. 1196, an insurance case, Lord Kenyon said:

> 'Acts of pirates are to be treated as acts of pirates: they do not profess to have any civil code of laws. . . . But civilized nations profess to be governed by certain rules, and the comity due from the courts in one country to those in another induces them to give credit to each other's acts. . . .'

Comity requires the courts of one country to give credit to and to presume the validity of the acts of another country that is dealing with piracy; but the acts of pirates lack even the semblance or presumption of lawful authority accorded to acts of recognized states. In the case of *In re Piracy Jure Gentium* (*infra*), Viscount Sankey L.C. quoted the report of the Matsuda Sub-Committee of the League of Nations which states:

> 'According to International Law, piracy consists in sailing the seas for private ends without authorization from the government of any state with the object of committing depredations upon property or acts of violence against persons.'

The current rule of international law regarding the acts of pirates in relation to the title to goods is undoubtedly summed up in the maxim:

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[1] In 1924 Professor E. D. Dickinson discussed the question whether the crime of piracy was obsolete (*Harvard Law Review*, 38 (1924–5), p. 357). He came to the conclusion that piracy was more than a matter of purely historical interest to lawyers (ibid., pp. 359–60). In 1925 Fauchille gave examples of piracy which had taken place in the nineteenth and twentieth centuries, notably in 1921, 1922, 1923, and 1924, in the Black Sea and in Chinese waters (*Traité de droit international public*, vol. i, Part 2, pp. 93–4; see also *Annual Digest of Public International Law Cases*, 1919–22, Case No. 112). Piracy in Chinese waters gave rise to the case of *In re Piracy Jure Gentium*, [1934] A.C. 584, which came before the Privy Council in 1934. Examples of piracy have been reported in 1947: see *The Manchester Guardian*, 19 June 1947; *The Times* newspaper, 25 November and 23 December 1947.

[2] See Smith in this *Year Book*, 23 (1946), p. 239, for an Army Order of July 1944 on the subject of booty.

pirata non mutat dominium. A pirate does not change the ownership of property; this rule is supported by classical writers like Bartolus,[1] Grotius,[2] Ayala,[3] Gentili,[4] Zouche,[5] Bynkershoek,[6] and others, as well as by modern writers like Pella,[7] Oppenheim,[8] and Higgins and Colombos.[9] Grotius[10] and more modern writers alike[11] trace this rule back to the *Digest* of Justinian[12] and thence to a reputed speech of Demosthenes,[13] a speech which, surprisingly enough, does not relate to the seizure of ships or other chattels but to the seizure of land. The subject of the speech was the small island of Halonnesus.[14]

When there is no title, none can be given. *Nemo dat quod non habet*; and temporary detention is not title. Drawing the lesson from the case of Halonnesus Grotius observes that *de facto* capture by a pirate is no capture in law and therefore the doctrine of postliminium is inapplicable to such captures.

> 'Things which pirates or brigands have taken from us have no need of postliminy as Ulpian and Javolenus decided; the reason is that the Law of Nations does not concede to pirates and brigands the power to change the right of ownership . . . things which have been captured by freebooters may be claimed wherever they are found. . . .
>
> 'Relying on this principle the Athenians wished to receive Halonnesus as restored, not as given by Phillip, because the pirates had taken it from them, and Phillip had taken it from the pirates.'[15]

Wheaton, citing the passage from Grotius, agrees:

> '. . . pirates have no lawful right to make captures, the property has not been divested. The owner has merely been deprived of his possession to which he is restored by the re-capture . . . the recaptor is entitled to a remuneration in the nature of salvage.'[16]

In view of these authorities and of the medieval practice to which we allude later, it is somewhat surprising to find Fauchille saying: 'Ce ne fût qu'à la fin du XVII^e siècle que la règle que la piraterie ne change pas la domaine . . . commence à être reconnue.'[1] The rule is, as we have seen, much older than the seventeenth century, and we can only assume that Fauchille was speaking with his eye mainly on the French Ordonnance de la Marine of August 1681[2] and without serious consideration of its historical antecedents and the historic practice of granting actions in courts of admiralty for the restitution of goods piratically taken.

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[1] In *Digest.* XLIX, xv. 19 and 24: *De captivis et postliminio et redemptis ab hostibus.*

[2] *De Jure Belli ac Pacis*, Book III, ch. ix, Carnegie translation, p. 713.

[3] *De Jure Belli*, ch. vi, Carnegie translation, p. 60.

[4] *De Jure Belli*, ch. iv, Carnegie translation, p. 22.

[5] *Juris et Judicii Fecialis*, s. vii, 13, Carnegie translation, p. 127.

[6] *Quaestionum juris publici* (1737), Carnegie translation, ch. xv, p. 90, and ch. xvii, p. 98.

[7] 'La Répression de la Piraterie', in Hague Academy, *Recueil des Cours*, 15 (1926) (v), p. 147, at p. 256.

[8] *International Law*, vol. i (6th ed. by Lauterpacht, 1947), p. 566.

[9] *International Law of the Sea*, p. 286. The French form of the maxim, given by Ortolan (*Diplomatie de la Mer* (1856), p. 280), is 'Pirate ne peut changer la domaine'.

[10] Op. cit., Book I, ch. vi, Carnegie translation, p. 60.

[11] Coleman Phillipson, *International Law and Custom of Ancient Greece and Rome*, vol. ii, pp. 370–5.

[12] XLIX, xv. 19 to 24.

[13] '. . . Dionysius of Halicarnassus quotes it without question as the Eighth Philippic, but Libanius in his introduction rejects it and definitely states that critics recognized it as the work of Hegesippus from its style and subject matter': Demosthenes—J. H. Vince—*On Halonnesus*, p. 148.

[14] Ibid., p. 151.

[15] Grotius, op. cit., ch. ix, Carnegie translation, p. 713.

[16] *Elements of International Law*, Text of 1866 with notes by Dana (1936), p. 383 (Part IV, para. 361).

II. *Jurisdiction of Court of Admiralty over goods piratically taken*

In the words of Marsden, the greatest British authority on the subject:

> 'The determination of matters connected with piracy, and the ownership of goods taken at sea, appears to have been from the earliest times peculiarly within the jurisdiction of the Chancellor.[2] Sometimes the whole matter was disposed of by him, and sometimes issues as to piracy or no piracy, and as to the ownership of property and ships spoiled, were directed out of Chancery to the King's Bench or to commissioners of oyer and terminer.'[3]
>
> 'It is not unreasonable to suppose that after battle of Sluys Ed. III acting upon the advice of the commissioners of 1339 [set up to deal with piracy claims] extended the jurisdiction of the Admiral, which up to that date had been mainly disciplinary and administrative, so as to enable him to hold an independent court and administer complete justice in piracy and other cases.'[4]

This did not, however, give the admiral exclusive jurisdiction over the goods taken by pirates, as Marsden himself shows. Nevertheless the principle that such goods should be restored to the true owners seems to have commanded general acceptance in all courts in the Middle Ages.[5]

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[1] Op. cit., vol. i, Part 2, p. 91.

[2] The Canonist maxim was 'non dimittitur peccatum nisi restituitur ablatum'.

[3] Selden Society, vol. vi: *Select Pleas in the Court of Admiralty*, vol. i (ed. by Marsden, 1894), at p. xvi.

[4] Ibid., pp. xxxv *ad fin.* and xxxvi: 'The origin of the Admiralty Court can be traced back with tolerable certainty to the period between the years 1340 and 1357. It was instituted in consequence of the difficulty which had been experienced in dealing with piracy or "spoil" claims made by and against sovereigns.

'The Battle of Sluys left Edw. III in a position to enforce this claim [to Sovereignty] by the institution of an Admiralty Court, of which the principal function was to keep the King's Peace upon the sea': ibid., at p. xiv.

[5] Ibid., p. xxxix; he includes the following five examples in his works: 1 Y.B. 22 Ed. III, 16, pl. 63: (1) (1349)—'a question as to the property of goods recaptured at sea from an enemy came before the common law courts and was decided in favour of the original owners'—'que par commun loy ceux que les ont par la main (mañ) ne lez pourront detenir' (ibid., p. xxxix); (2) a precept by the Council to Mayor and Bailiffs of Southampton, that in 1352 goods taken by pirates be delivered up to owners upon their giving bail at appraised value (ibid.); (3) in 1353—'Restitution was ordered by Admiralty and Council because by the law maritime the ownership of goods taken by pirates is not divested unless the goods remain in the pirates' possession for a night' (ibid., p. xl). (Was there a confusion here with the rule mentioned by Grotius (op. cit., Book III, ch. vi, para. 3) regarding legitimate capture by legitimate enemies after loss of possession to an enemy for 24 hours?) Curiously enough, this 24 hours' rule seems to have persisted in the Spanish law of piracy from 1621 to 1801: see *Harvard Law Review*, 45 (1932), p. 1005; (4) in 1354, 27 Ed. III, st. 2, c. 13, provided for restitution to foreign merchants without their having to sue at common law (Selden Society, vol. vi, p. xi). Common law juries were not

The claims of rival courts and rival procedural systems for restoring pirates' goods occasioned a good deal of controversy in our legal history, and in the Middle Ages we find Parliament protesting against encroachments of the Admiralty upon the jurisdiction of the other courts.[1] In the fourteenth and fifteenth centuries compensation for those despoiled was often provided for by special courts set up under treaties between princes for that purpose.[2] In the fifteenth century the common law courts seem to have lost ground. In 1429 'The *Criminal* jurisdiction of the common law courts in cases of piracy appears to have fallen into desuetude.'[3] The jurisdiction of the Chancellor seems also to have needed reaffirming in that century for, according to Marsden, in

> '1453 an act was passed enabling the Chancellor with the assistance of one of the judges, to hear cases of spoil by an Englishman upon a foreigner, to deal with receivers of spoiled goods and to make restitution. In 1470 we have the process of a case of spoil heard before the chancellor; the writ contains special directions that, on account of the difficulty of otherwise proving the spoiling, the evidence of the spoiled Spaniard is to be received by way of proof. It must not be inferred from the terms of this statute that the Chancellor had previously no jurisdiction to hear cases of spoil. The contrary was affirmed by a resolution of all the judges in the reign of Richard III. During the previous and subsequent reigns there are many instances of piracy cases being heard before the Chancellor.'[4]

The Court of Admiralty itself appears to have languished at times.[5] However, numerous 'spoil' cases were tried by the Admiralty in both the sixteenth and early seventeenth centuries.[6] From Elizabeth to Charles II there was a struggle for jurisdiction between the Admiralty and the courts of common law in which the latter resorted to writs of prohibition, and not without some success. We need not enter into detail here concerning the conflicts of jurisdiction except to observe that, according to Marsden's later opinion,

> 'the dispute between the common law and Admiralty judges had reached an acute stage sometime before the year 1606, when Lord Coke was raised to the Bench . . . the earliest interference with Admiralty jurisdiction here recorded was by way of super-

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always sympathetic to the claims of foreigners; (5) in 1443 we read of a 'Writ directing that a ship and goods which had been captured and brought to England and there ordered to be restored to her Breton owners, should be detained, on the ground that the owner of them had himself piratically captured a ship and goods of Englishmen to whom letters of reprisal against the Bretons has been issued': Chancy. Misc. 28 File 7, No. 25, cited by Marsden, op. cit., p. 132.

[1] E.g. 13 Ric. II, st. 1, c. 5; 15 Ric. II, c. 3; 2 Hen. IV, c. 11.

[2] See Lewis, 'Responsibility for Piracy in the Middle Ages', in *Journal of Comparative Legislation and International Law*, 19 (1937), p. 87.

[3] Selden Society, vol. vi, op. cit., p. liv.

[4] Ibid., vol. vi, p. lv; vol. xiv of the Lists and Indexes of *Proceedings of the Court of Star Chamber 1485–1558*, notes, in vol. xvi, pp. 17–18, the case of *Hans Gauth* v. *John Abbot of Whitby, John Conyers and others*—receiving goods plundered by pirates from the plaintiff's ship in the Humber.

[5] See Marsden in Selden Society, vol. vi, pp. lvi and lvii.

[6] Ibid., p. lxvi; and see, for example, case in 1546, ibid., p. 141; and Selden Society, vol. ii, 'Select Pleas in Court of Admiralty, 1547–1602', pp. lxix–lxxvii.

sedeas and certiorari, issuing apparently from chancery . . . common law courts were not resorted to for prohibitions, until it was found that applications to the Council and to the Chancellor usually resulted in the Admiralty being left to exercise the jurisdiction which it claimed.'[1]

The Admiralty nevertheless continued in the seventeenth and eighteenth centuries to decree restitution of property recaptured from pirates.[2]

The low-water mark of Admiralty jurisdiction seems to have been reached in the nineteenth century in *The Warrior* (1818), 2 Dods. 288, where it was actually decided that the Admiralty could only deal with claims to the *possession of ships* where title was not involved; thereafter questions of title to ships were matters for the courts of common law only, until the position was changed by the Admiralty Court Act, 1840, now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (i) (*a*) (i) and Sched. VI.

In time of war the Admiralty judges, sitting in prize, have always determined questions of title to ships under international law.[3]

Questions relating to goods taken from pirates, droits of admiralty, and salvage, were all among the subjects of Admiralty civil jurisdiction under the old law merchant: these matters have been kept by the Admiralty to this day. Nor is this surprising in view of the somewhat insular if patriotic attitude of common law juries in cases involving the goods of foreigners. The charge to the jury in *R.* v. *Dawson* (1696), 13 St. Tr. 451, makes this plain; and the acquittal of the prisoners in the case of *In re Tivnan and Others*, 5 B. & S. 697, 122 E. Rep. 971, shows that a very slight show of lawful authority secured a refusal from a court of common law to convict or to extradite an alleged pirate at a much later date.[4]

On the whole, the Court of Admiralty seems to have been the most suitable court for the recovery of goods taken piratically, and its procedure appears to have had real advantages over that of the common law courts, for piracy is a crime by international law and the Court of Admiralty regularly administers matters of international law and regularly exercises an international jurisdiction.[5]

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[1] Selden Society, vol. ii, p. xli; see *Paulston* v. *Walton*, ibid., p. lii.

[2] Marsden, op. cit., vol. ii, p. 103 (1680—ship), and p. 250 (1719—goods).

[3] 'Prior to the Naval Prize Act, 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war': *per* Lord Parker in *The Zamora*, [1916] A.C. 77.

[4] Archbold, *Criminal Pleading*, 31st ed. (1943), p. 607, supports this attitude to-day, quoting Sir Leoline Jenkins. When a conviction for an act of piracy was obtained in a court of common law in circumstances which amounted to a felony at common law, there may at times have been a danger of forfeiture to the Crown of all property found in the felon's possession: for a discussion of this see *The Panda* (1842), 1 W. Rob. 423, 166 E. Rep. 631—though piracy was not itself a common law felony, at any rate in 1429 (see Selden Society, vol. vi, p. liv).

[5] 'Piracy, at common law, is perhaps the only crime which still retains some trace of an international character, in the rule that it can be tried by the court of any country wherever and by whomsoever committed': Holdsworth, *History of English Law*, vol. i (2nd ed.), p. 552.

Acts of war in relation to ships and property are matters for prize courts; but the results of police or defensive action by the Royal Navy and others against pirates and unrecognized insurgents may still have to be dealt with under the inherent civil jurisdiction of the Admiralty Court supplemented by the Piracy Act of 1850. This Court can to-day deal with the problems of title arising in peace-time, not only from the possession of goods piratically taken, but also in respect of ships recaptured from pirates.[1]

III. *Salvage on recapture*

The Admiralty Court has always had jurisdiction over claims for salvage rendered on the high seas.[2] The right to remuneration for salvage by His Majesty's ships of ships and goods piratically taken was affirmed by the Piracy Act, 1850, section 5. This Act was not expressly repealed by the 22nd Schedule to the Merchant Shipping Act, 1894, although by section 557 of that Act no claim for salvage by one of H.M. ships might be brought without Admiralty consent. Halsbury[3] treats claims for salvage under the Act of 1850 as still possible. In any case, since the Merchant Shipping (Naval Salvage) Act, 1940, the Crown has now the same claim for salvage as anyone else.[4]

Owners of cargo can still presumably take direct action to protect themselves and their goods against pirates, and in doing so they may conceivably salve goods of third parties previously taken by pirates.[5] In the words of the Harvard commentator:

> 'There seem to be no statutory provisions now in effect dealing with salvage in the case of captures from pirates made by private persons, but presumably the general principles of salvage law would control.'[6]

Salvors will have a maritime lien on goods salved by recapture, and the true owners of the goods salved must discharge this lien before recovering the goods.[7] The basis for a claim for salvage was recognized in the passage quoted by Grotius and attributed to Demosthenes:

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[1] See *American Journal of International Law*, 26 (1932), Suppl., p. 912; Roscoe, *Admiralty Practice*, 5th ed. (1931), p. 9, and his *History of the Prize Court*, p. 10.

[2] Extended by the Supreme Court of Judicature Act, 1925, s. 22 (i) (*a*) (v), to claims arising within the body of a county.

[3] Op. cit., vol. i (2nd ed.), p. 104.

[4] Section 1: '(1) Where salvage services are rendered by or with the aid of any ship, aircraft or other property whatsoever belonging to His Majesty, His Majesty shall be entitled to claim salvage for those services, and shall have the same rights and remedies in respect of those services as any other salvor would have had if the ship, aircraft or property had belonged to him.'

[5] The Harvard Draft on Piracy, Art. 12, would limit 'a seizure because of piracy' to naval vessels. But it is pointed out in the notes (at pp. 7 and 8) that Stiel (*Der Tatbestand der Piraterie*) does not accept this view. We certainly do not accept this view either, if it would result in preventing an owner from taking back his own or from salving the goods of others in the course of recapture.

[6] See *American Journal of International Law*, 26 (1932), Suppl., p. 913.

[7] *The Veritas*, [1901] P. 304, 311.

'So things which have been captured by freebooters may be claimed wherever they are found, excepting that, as we have elsewhere held, on the basis of the law of nature, he who has obtained possession of a thing at his own expense should be reimbursed in the sum which the owner himself would have been glad to pay for its recovery.'

The general principle governing salvage of goods taken from pirates was, according to Marsden,[1] laid down in 1719 in a 'Report of the Advocate General as to the ownership of goods recaptured from pirates':

> 'If the sugars are really and *bona fide* the goods or effects of such French merchant, that then the spoil made by pyrats is not such a taking as can ever alter the property of the first owners; but that he may still pursue his claime thereto, and recover them wherever he can find them, and by whatsoever hands they may have been regained from such pyrats. However the first owner must make a reasonable allowance out of them and by persons by whom he has benefitted in the recovery of his possessions, and for keeping them and bringing them home; and this is founded upon the law of nations, which allows not any alteration of property by piratical takings. And as pirates are enemies of all mankind, so all mankind must be friends with one another against pirates and their spoils. . . .'

This is echoed in Article 13 (2) (3) of the Harvard Draft on Piracy, which allows a 'fair charge for salvage and expenses of administration'.[2] There is, however, a lack of uniformity in the charge for salvage. The French Decree of 22 May 1803 provides for the return of ships and goods to their owners 'upon the payment of one third the value of the ship and merchandise as a charge for recapture'.[3] The law of Spain also allows salvage of a third of the value of the thing restored.[4] The amount allowed to British naval captors is only 12½ per cent.;[5] this percentage may well be a guide for English courts if they have to deal with claims by civilians for salvage of goods piratically taken. A uniform method of estimating such salvage and the fixing of an upper limit for salvors are matters which might well be dealt with by international convention. To permit an excessive claim for salvage might well be to permit the virtual expropriation without adequate compensation of despoiled shipowners or merchants.

IV. *Droits of Admiralty in respect of property of pirates*

According to 27 Ed. III, st. 2, c. 13, where ownership could not be established, property taken from pirates was liable to be condemned as droit of the Admiralty. Captain Kidd's goods were so condemned and sold at the Royal Exchange in 1701, the King being then in enjoyment of the droits of the Lord High Admiral in respect of goods piratically taken.[6] In 1606 a first decree had been made condemning to the Lord Admiral pirates' goods, no one having appeared after citation to claim any interest therein.[1] If the Court sold perishables, as it was empowered to do by 27 Ed. III, st. 2, c. 8, the proceeds were not droits of Admiralty but could be claimed by the owner.[2] The general rule appears to have been well expressed in *The Panda*[3] by Dr. Lushington, who was careful to preserve the Admiralty practice of restoring goods to the true owner and to limit the claim for droits of Admiralty to the property of the pirate himself and not that of third parties, following the earlier *Prinston* case.[4] Marsden, as we have already observed, gives a number of instances of restitution by the Admiralty[5] of goods taken by pirates in the seventeenth century, and the trend of authorities is directly at variance with the opinion of Sir Leoline Jenkins that the claim for droits extended to *all* goods in a pirate's hands if not claimed within a year by third parties. The law is expressly laid down to the contrary effect in the *Prinston* case (*ubi supra*) by Lord Coke:

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[1] *Law and Custom of the Sea*, vol. ii, p. 250.

[2] Op. cit., p. 846.

[3] Ibid., p. 964.

[4] Ibid., p. 1007.

[5] Piracy Act, 1850, s. 5 (v).

[6] Marsden, op. cit., vol. ii, p. 184.

> 'All the authorities decide *that goods and property strictly belonging to pirates are droits of Admiralty*, and all the authorities, with the exception of Sir Leoline Jenkins determine, that *goods found in the possession of pirates and not their property, are not droits of Admiralty*.'

A condemnation and forfeiture of pirates' own goods as droits of Admiralty is a valid confiscation based on a universal criminal law of piracy. Goods not belonging to the pirate are the property of those from whom they were taken by the pirate. The suggested rule allowing an owner one year from recapture in which to reclaim his goods, accepted by Sir Leoline Jenkins,[6] is mentioned by Pradier-Fodéré[7] who says that there is a conventional rule to this effect, though Judge Hackworth would make the time run from the date of *sentence* of capture.[8] It is possible that the period of one year was suggested by the period of prescription for mancipable movables in Roman Law. In any case, although one year from capture or sentence will allow a reasonable time to owners in most cases, in unsettled times it may not be enough. For this reason we consider that Article 13 of the Harvard Draft, which does not fix a definite time for claims, and which would require the state disposing of ships and goods seized from pirates (*inter alia*) to observe the two following conditions, would perhaps be a more satisfactory guide for courts than that of Pradier-Fodéré or Hackworth. The Harvard Draft provides:

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[1] Marsden, op. cit., p. 369; privateers who exceeded their authority and despoiled friends were also liable to forfeiture: see ibid., pp. 399 and 400, and Selden Society, vol. xi, p. 204.

[2] By the statute 27 Ed. III, s. 2, c. 8: '. . . the merchant robbed shall be received to prove that the goods and chattels belong to him, by his chart or cocket, or by other proof of merchant, and the said goods shall be delivered without any suit at the common law . . . if the goods are bona peritura the king may sell them and upon proof restore the value.' For an instance of the restitution of the proceeds of such perishables to a Spaniard in 1606, see Marsden, op. cit., vol. ii, p. 366.

[3] (1842), 1 W. Rob. 423, 166 E. Rep. 631. Dr. Lushington (at p. 635) did not accept the statement of Sir Leoline Jenkins that *the Admiral* was entitled not only to goods and ships of pirates themselves but also 'all goods taken from pirates if not claimed in a year'.

[4] *Prinston and Others* v. *Admiralty* (1615), 3 Bulst. 147, 81 E.R. 126; the right to seize for droit of Admiralty did not extend to the goods of third parties. Lord Coke C.J. said: 'The Lord Admiral should not have these goods which the pyrate had stolen from others, but only his own proper goods; and that the owners of the rest should have their goods to them restored again, if they came for them: and if they came not, *then they were to be forfeited to the King*, the rule being, *quod non capit Christus, capit fiscus*.'

[5] *Law and Custom of the Sea*, vol. ii, pp. 293–396; and see *supra*, p. 260.

[6] *Supra*, n. 3.

[7] *Droit International Public*, vol. v, pp. 810, 814–15 (cited in *American Journal of International Law*, 26 (1932), p. 851, which cites numerous treaty rules to this effect at pp. 851–2).

[8] Hackworth, *Digest of International Law*, vol. ii (1941), p. 683, follows the rule laid down by

'(*a*) The interests of innocent persons are not affected by the piratical possession in case of property, nor by seizure because of such possession or use.

'(*b*) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims.'

The best protection of innocent owners is to allow them specific restitution of identifiable goods in a reasonable time on payment of reasonable charges for salvage. The rule relating to *naval* capture in section 5 of the Piracy Act of 1850 is in accordance with this conception and in our view is worthy of general application in all cases of recapture from pirates.

The jurisdiction in respect of forfeiture as droits of Admiralty by the Admiralty Division of the High Court to-day is inherited from the international law administered by the Court of Admiralty. It operates in peace-time and war-time alike; when the High Court acts as a Prize Court in time of war, it also operates under international law, and may in an appropriate case condemn a ship as prize. In *A.G.* v. *Norstedt* (1816),[1] 3 Price 93, 146 E.R. 203, it was laid down that the decree of the Court of Admiralty binds the whole world,[2] and in international law matters this seems to be the case.

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the League of Nations Committee on Piracy as regards conditions for recovery and restitution of goods stolen:

'1. The owner must lodge his claim within a year after sentence of capture has been passed.
'2. The claimant must vindicate his claim of ownership before the competent tribunals.
'3. The costs of recovery are fixed by such tribunals.
'4. The costs must be borne by the owner.'

See also Field's Draft Code, in *American Journal of International Law*, 26 (1932), p. 877.

[1] Not 1716.

[2] See also *Re Helen* (1823), 1 Hagg. 145, 166 E.R. 51: 'In *The Odessa* Lord Mersey, in delivering the Opinion of the Privy Council in a prize case said: "The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure and to transfer it as from that date to the Sovereign or to his grantees . . . as the right to seize is universally recognized, so also is the title which the judgment of the Prize Court creates. The judgment is of international force." (1916) 1 A.C. 145, at p. 153; and see Hyde, *International Law*, ii, s. 903.' Moreover, in *Lindo* v. *Rodney* (1781), 2 Douglas at p. 614, 99 E.R. 385, the Court of Admiralty vigorously asserted its own exclusive competence as an international court to settle the question of prize or no prize. In *Hughes* v. *Cornelius* (1683), 83 Eng. Rep. 247, and 89 ibid. 907, the Court refused to examine a French Admiralty condemnation as prize. In note (*b*) at p. 908 of 89 E.R. it is said: 'Such a sentence is conclusive as to everything that appears on the face of it, *Barazillay* v. *Lewis*, Park Ins. 359, so, where no special ground is stated but the ship is condemned generally as good and lawful prize, *Saloucci* v. *Woodhouse*, Park 362, unless manifestly, upon the face of it, against law and justice, *Saloucci* v. *Johnston*, Park Ins. 364, or contradictory to itself, *Mayne* v.

Condemnation would appear to be necessary both for a pirate's ship and his goods if the Court's decree is to result in a sale (to realize droits) which is to be a root of title. If condemnation and sale be made too precipitately, the true owner of goods condemned in error as pirates' goods will have a claim against the Crown; before the Crown Proceedings Act, 1947, the remedy would be by a petition of right.

V. *Title of purchasers from pirates in the absence of condemnation as droits of Admiralty*

For obvious reasons international law cannot allow title to pass to those who take from a 'pirate *jure gentium*' whether in market overt or otherwise. These reasons are given clear expression by Professor Pella:

> 'The owner who is the victim of an act of piracy has an absolute right to recover possession of the objects taken from him, wherever those objects are found. Even if a third party acquires them in good faith and does not ever know that the object has been acquired as a result of piracy, he could only have an illegal and precarious title: he could never become owner because of the absolute nature of the maxim *pirata non mutat dominium*.'[1]

The relevant Article 13 of the Harvard Draft[2] is not so clear and forthright as Professor Pella's statement. It leaves the disposal of ships and property seized because of piracy to the state concerned, though, as we have seen, it requires that state to give effect to the claims of innocent owners. It does not deal with conflicting claims of owners and purchasers of property

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Walter, Park 363.' So according to the opinion of Lord Mansfield in the case of *Bernardi* v. *Motteux*, Doug. Rep. 581, the judgments of foreign courts of Admiralty, *as to matters within their jurisdiction*, cannot be controverted collaterally in a civil suit, but must be revised by the regular court of appeal. In *Geyer* v. *Aguilar* (1798), 7 T.R. 681, 101 E.R. 1196, it was said by Lord Kenyon Ch. J.: 'The French courts seem in this instance to have proceeded in Algerine (nay in worse) principles; because they professed to proceed according to law and made the law a stalking horse for an act of piracy. But I cannot now question the legality of their decision.' In *Le Caux* v. *Eden* (1781), 2 Douglas 595, at p. 609 (99 E.R. 375, at p. 383), Buller J. observed: '. . . the principle is, that the question "prize or not prize" and the consequences of it, are conusable solely in the Admiralty court; the true reason of which is, that prizes are acquisitions *jure belli*, and the *jus belli* is to *be determined by the law of nations, and not by the particular municipal law of any country*.' So, too, we may say, as regards condemnation in respect of piracy *jure gentium* as distinct from any condemnation in respect of mere statutory piracy.

[1] Loc. cit., p. 258. See also Phillimore in *Encyclopedia Britannica*, vol. xxi (11th ed.), p. 639.

[2] Printed in *American Journal of International Law*, 26 (1932), Suppl., No. 4, pp. 847–8. That Article provides:

'1. A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.

'2. The law of the state must conform to the following principles:

'(*a*) The interests of innocent persons are not affected by the piratical possession or use of property, nor by seizure because of such possession or use.

'(*b*) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims.

'(*c*) A claimant who establishes the validity of his claim is entitled to receive the property or compensation therefor, subject to a fair charge for salvage and expenses of administration.'

from pirates before condemnation of such property. Indeed, the Harvard Draft, according to the commentary,[1] would permit 'the state to dispose of the property according to its own law and to satisfy the claim of the innocent owner or lienor *at its option*[2] by a money payment of the fair value of the claim minus a charge for salvage and administration'. We have already seen that a money claim was allowed by the legislation of Edward III for perishables sold by the Court, but that the normal rule of the English Admiralty, following the classical writers, has always been to permit the specific restitution to an owner of non-perishable property of his taken by pirates, where this is possible. It is submitted that this practice is the most satisfactory one. In these days of monetary controls and fluctuating currencies, specific restitution is undoubtedly a right which courts should safeguard.

The title of purchasers of property of third parties taken by pirates before their condemnation seems to be a defeasible one *when once the goods come into the possession of a court of Admiralty*, or are arrested by Admiralty procedure.[3] According to Pitt Cobbett:[4]

> 'The stigma of piracy attaches to the vessel and warrants her confiscation; but not, it seems, to the cargo where this belongs to innocent persons. Nor will the taint of piracy attach to the vessel if she has, before condemnation, passed into the hands of a *bona fide* and innocent purchaser.[5] Nevertheless, a pirate cannot strictly confer title, and, on recapture, vessels or property seized by pirates will revert to their former owners, if the real ownership can be ascertained, subject to the payment of salvage to the recaptor.'

In other words, the recaptor is not free to deal with the goods or ship taken unless, of course, they happen to be his own. Proceedings in the Admiralty Division will compel the recaptor to recognize the title of the true owner. The Court of Admiralty will prefer the title of the person robbed to that of anyone taking by purchase or otherwise from the pirate.[6]

In spite of the limiting of the Admiralty jurisdiction in commercial matters by the writ of prohibition issued from the King's Bench in the seventeenth century,[7] by the time of the Restoration the pre-eminent jurisdiction of the Admiralty over maritime cases and prize seems to have been accepted in that and the succeeding century.[1] Proceedings in the Admiralty for the restitution of property taken by pirates seem to have met with the writ of prohibition only where the operation of some common law rule like that of market overt appeared to be in danger.[2] There was no conflict in other cases of piratical taking, since a thief cannot give a title to chattels at common law. Indeed, the protection afforded to purchasers in market overt was not by any means absolute even at common law.[3] Nowadays, however, the High Court has succeeded to both common law and Admiralty jurisdiction, and the protection afforded by a purchase in market overt is expressly limited by virtue of the Sale of Goods Act, 1893. Section 22 only protects a 'purchaser in good faith without notice of any defect or want of title on the part of the seller'; section 24 provides that 'where goods have been stolen and the offender is prosecuted to conviction', the title of the true owner to property revests upon a conviction 'notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise'. By section 62 of that Act, 'goods include all chattels personal other than things in action or money'.[4] It would seem, therefore, that there is no longer any possible conflict between common law rules and the Admiralty rule which permits chattels taken piratically to be restored, whenever the pirate has been convicted of stealing.

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[1] At p. 848.

[2] Italics throughout this article are by the present writer.

[3] The Admiralty has a right to arrest property the subject-matter of a dispute: Halsbury, op. cit., vol. i, p. 81; and see *The Beldis*, [1936] P. (C.A.) 51.

[4] *Leading Cases on International Law*, vol. i, 'Peace' (6th ed., 1947), p. 318.

[5] *Reg.* v. *McCleverty* (L.R. 3 P.C. 673). Cf. dictum in *The Telegrafo* (1871), L.R. 3 P.C. 673, at p. 689.

[6] Marsden (op. cit., p. 372) quotes an example from a sentence of 1608: 'For restitution of Venetian goods captured by Ward, the pirate, and bought by the defendant. Admiralty Court Libels, 73 No. 7'; and again (at p. 382) a sentence in 1611:'Condemning the Captain of H.M.S. Advantage in the value of gold captured by him from a pirate (Harris). Admiralty Court Libels, 75, No. 234.'

[7] See Sack, *Conflicts of Laws in the History of the English Law*, p. 376.

What happens when the pirate is dead, or for some reason cannot be convicted? Can the purchaser rely upon the market overt rule, or any similar foreign rule in order to claim a title from the pirate and retain the property against the true owner? So far as a purchaser in market overt is concerned there would seem to be a strong argument nowadays based on public policy for applying the international rule of the Admiralty Court and allowing an action for the restitution of goods piratically taken, even where the revesting provisions of the Sale of Goods Act cannot be prayed in aid by the true owner because of a failure to convict an absent or deceased pirate of stealing. English law must, as we have seen, be construed if possible in accordance with international law. A decree of restitution might, we think, still be claimed at any rate when goods are within the jurisdiction of the Admiralty Court, if the fact of piracy can be proved, even if a conviction is impossible because of the pirate's death or absence, e.g. when arrested for the enforcement of a maritime lien for salvage or for any other purpose. When, however, a purchaser in market overt remains in possession of property acquired in good faith from a pirate and when there has been no conviction of the pirate, and the goods have not been arrested, then the purchaser may presumably remain in possession until the Court of Admiralty orders the arrest of the property at the suit of some person claiming restitution. According to *In re Blanshard*[1] the Admiralty has inherent jurisdiction to detain a vessel 'in a suit instituted by the real owner against a mere wrongdoer' (*per* Abbott C.J., at p. 249).

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[1] Sack, op. cit., pp. 385 and 396.

[2] Ibid., p. 364.

[3] In *Bentley* v. *Vilmont* it was said by Lord Branwell: 'It is manifest from the old authorities, Glanvil, Fleta, the Mirror, and others, cited by Mr. Charles, that in the case of stolen goods the plaintiff in a proceeding by appeal in which he established the theft was entitled to a restitution of stolen goods, though they had been sold in market overt. That indeed changed the property, but that property was restored on the success of the proceeding. It cannot be doubted that the statute of Henry VIII was intended to have the same effect and consequences. This is shewn by the reason of the thing and the authorities, and indeed was admitted by the Attorney-General. If this then were a case of stolen goods, the plaintiff's right could not be contested': (1887) 12 A.C. 479–80. And see Plucknett, *Concise History of the Common Law*, 3rd ed., p. 401.

[4] By the law merchant, negotiable instruments are treated like money and are of course subject to special rules now incorporated in English law favouring bona fide holders in due course.

What is the position of a bona fide purchaser from a pirate, where a title is obtained by some local rule of a foreign *lex situs* analogous to the market overt rule? Will English courts recognize the title in accordance with the rule in *Cammell* v. *Sewell*?[2] That case did not relate to the title to goods taken piratically, but to the title a Norwegian purchaser of goods derived from the sale by the captain of a ship wrecked off the coast of Norway.[3] Comparison was made with the English law of market overt, but no mention was made of any problem of revesting upon conviction, because there was no piracy or stealing in question here. Cockburn C.J. expressly said: 'The law of nations is by no means uniform as to the power of the master.' The law of nations is of course uniform on the rule *pirata non mutat dominium*. The sale in *Cammell* v. *Sewell* (clearly different from the case of a sale by a pirate) was, to quote Cockburn C.J. again: 'A good contract of sale to transfer the property in Norway, *without anything to shew that by the general law of nations, or by the law of any nation which can possibly apply* to the present case, that the sale valid in Norway can be invalidated elsewhere.'[3] A sale by a pirate would certainly be against the general law of nations, within Lord Cockburn's own exception to *Cammell* v. *Sewell*. In his dissenting judgment Byles J. held (at p. 1380) that the sale in *Cammell* v. *Sewell* was in fact 'at variance with the general maritime law of the world',[4] and quoted *The Eliza Cornish or The Segredo*.[5] It is important to stress that Compton J., one of the majority in *Cammell* v. *Sewell*, did not disapprove of *The Eliza Cornish*[6] in so far as it stated general international law with regard to piracy, a subject which was not in question in *Cammell*

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[1] (1823) 2 B. & C. 244; 24 R.R. 329.

[2] (1860) 5 H. & N. 728; 29 L.J. Ex. 350; 157 E.R. 1371.

[3] 'By the law of Norway the captain, under circumstances such as existed in this case, could not, as between himself and his owners, or the owners of the cargo, justify the sale but that [*sic*] he remained liable and responsible to them for a sale not justified under the circumstances; whilst on the other hand, an innocent purchaser would have a good title to the property bought by him from the agent of the owners': *per* Compton J., at p. 1377.

[4] He added: 'sales in market overt . . . are domestic not international transactions and are not at variance with any general law of nations on the subject. . . .'

[5] Spink's Eccl. & Admiralty Rep. 36; 164 E.R. 22.

[6] *The Segredo otherwise The Eliza Cornish, supra.*

v. *Sewell*. He merely referred to the *Segredo* case in *Cammell* v. *Sewell* (at p. 1378) in the following terms:

> 'If this case be an authority for the proposition that a law of a foreign country of the nature of the law of Norway, *as proved in the present case*, is not to be regarded by the courts of this country, and that its effect as to passing of property in the foreign country is to be disregarded, we cannot agree with the decision.'

The facts of the *Segredo* case are interesting. The *Eliza Cornish* was seized by insurrectionists in Magellan and the master shot. She was later taken by H.M.S. *Virago*, who put a crew on board, and in March 1852 she sailed for Liverpool but never arrived. In December 1852 she arrived at Bristol with oranges from the Azores, under the new name of *Segredo*. The ship, being in bad condition, had been sold at Fayal. Dr. Lushington said the sale by the master could only be justified by necessity, 'the sale, though bona fide, and beneficial to the owners, will not avail without necessity'.

The Admiralty has its international maritime law tests for the validity of sales and will apply them. In our view the cases of *Cammell* v. *Sewell* and *The Segredo* are not inconsistent with each other since both make a reservation in favour of the rules of the law of nations in cases where that law is relevant, as indeed it is in cases of piracy. Blackburn J. said, in *Castrique* v. *Imrie*:[1]

> 'In the case of *Cammell* v. *Sewell* a more general principle was laid down, viz. that "if personal movable property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere".
>
> 'This, we think, *as a general rule is correct, though no doubt it may be open to exceptions and justifications*.'

Title from a pirate is clearly one of these exceptions by international law. We are inclined to assume, therefore, that national laws of the character of market overt will be construed as of territorial operation only, should they conflict with what appears to be the clear rule of international law: *pirata non mutat dominium*. Indeed, the whole tendency in our courts is to construe even *the execution of acts of a recognized government* as territorial only, when they purport to affect the title to property outside the territory of the sovereign performing the act.[2] We do not therefore think that a purchaser from a pirate, who obtained a title by a foreign *lex situs*, is in any better position than a purchaser in market overt in English law, should such purchaser, or the goods purchased, be amenable to the jurisdiction of an English court.

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[1] (1869) 4 App. Cas. 429; Schmitthoff, *English Conflict of Laws*, p. 376, puts the matter rather too broadly.

[2] *Le Couturier* v. *Rey*, [1910] A.C. 262. See also *Mélanges Pillet*, vol. ii; *The Jupiter* (No. 3), [1927] P. 122; *Banco de Viscaya* v. *Don Alfonso de Borbon*, [1935] 1 K.B. 140; *Tallinna Laevauhisis A/S* v. *Tallinn Co., Ltd.*, [1946] 175 L.T. 285. *Lorentzen* v. *Lydden & Co., Ltd.*, [1942] 2 K.B. 202, is only an apparent exception, since there was a valid reason for expropriation against indemnity here.

VI. *Unrecognized insurgents*

The acts of unrecognized insurgents and their relation to the law of piracy have been exhaustively discussed recently by Professor Lauterpacht in his book *Recognition in International Law*.[1] He arrives at the conclusion, *inter alia*, that 'When unrecognized insurgents molest the ships of third States they may be treated as pirates, although even in this case the political motives of the act and the absence of an *animus furandi* suggest punishment less severe and drastic than that ordinarily meted out to pirates'.[2] This conclusion, it is believed, describes correctly the legal position. Molestation of ships by unrecognized insurgents will be treated as piracy and an action for restitution permitted by the High Court in England. Both piracy and robbery by unrecognized insurgents take place without legitimate authority, and by force; they pass no title. Nevertheless, taking by insurgents, if for political motives, might conceivably amount to a claim of right to prevent a conviction for larceny and the consequent statutory revesting of the property in the true owner despite a sale in market overt. But it is possible that even recognized insurgents, like privateers of former days, may be guilty of piracy when they use insurgency as a cloak for robbery. Certainly direct naval action against such insurgents would be justified.[3]

So far as treason is concerned, it is unlikely that an English court would hold the taking of property by a British traitor to be by claim of right,[4] or that the treasonable use of force would amount to anything less than stealing.

VII. *Action for damages*

If for any reason restitution of goods piratically taken cannot be obtained, then either a claim in lieu of restitution in the Admiralty Division, or an ordinary action in tort, will lie against the pirate or the estate of the pirate, provided that a writ can be served. The act of piracy was wrongful when accomplished and amounts to a conversion under English law, and an action will lie in respect of an act which is a tort according to English law and which is unlawful according to the *lex actus*.[5] But as we have indicated, compensation nowadays is often an inferior remedy to specific restitution, and the Admiralty procedure for despoiled persons may well be revived.

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[1] (1947), Chap. XVIII.

[2] At p. 309.

[3] *Piracy in the Levant, 1827–28*, Navy Records Society. See the report of Cmdr. Irby, pp. 114–15, on direct action taken by the Royal Navy in such a case to recover cargo plundered by so-called insurgents from an Austrian and an English vessel.

[4] *Supra*, p. 268.

[5] *The Tolten*, [1946] P. 135.

PRIVATE PROPERTY, RIGHTS, AND INTERESTS IN THE PARIS PEACE TREATIES

By ANDREW MARTIN, PH.D., DR.JUR.

1. *Introductory*

In order to place in their proper perspective those clauses in the five Peace Treaties[1] which deal with private property, rights, and interests it is necessary, in the first instance, to define their connexion with reparations. The claims of the victorious belligerents and those of their nationals for loss or damage due to acts of war (including the occupation of territory) are disposed of in these Treaties in two principal ways: (1) *collectively*, by imposing upon the defeated states an obligation to *pay* reparations and by reserving for the victorious states the right[2] to *seize and retain*, by way of reparations, enemy property found within their respective territories on the coming into force[3] of the Peace Treaties; (2) *individually*, by providing for the *restitution* of identifiable property removed by force or duress from United Nations territory, and for the *restoration* of, or payment of compensation for, United Nations property, rights, and interests which existed in enemy territory before the war.

In addition to these positive dispositions there are sets of rules whereby, *on the Allied side*, all claims—including private claims—for loss or damage due to acts of war (with the exception of claims to the restitution or restoration of identifiable property) are waived[4] in consideration of reparations; and, *on the enemy side*, all private claims against the Allied and Associated Powers arising out of the war or out of action taken because of the existence of a state of war are waived absolutely.[5]

At the same time, enemy Governments are placed under an obligation to pay their own nationals compensation:

(*a*) for property taken for reparation purposes in enemy territory[6] or seized and retained for the same purpose in United Nations territory;[7]

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[1] The following abbreviations will be used: I.T., Peace Treaty with Italy; R.T., Peace Treaty with Roumania; B.T., Peace Treaty with Bulgaria; H.T., Peace Treaty with Hungary; F.T., Peace Treaty with Finland; all of 10 February 1947. T.V., Treaty of Versailles, 1919.

[2] Except in the case of Finland.

[3] 15 September 1947.

[4] Art. 80, I.T.; there is no express declaration to this effect in the four other treaties, but it is submitted that the legal position is not affected by the absence of such declarations.

[5] Art. 76, I.T.; Art. 30, R.T.; Art. 28, B.T.; Art. 32, H.T.; Art. 29, F.T.

[6] Art. 74 (E), I.T. No corresponding provision appears in the four other treaties.

[7] Art. 79 (3), I.T.; Art. 27 (3), R.T.; Art. 25 (3), B.T.; Art. 29 (3), H.T. The question of

(*b*) for supplies and services requisitioned by Allied forces in enemy territory;[1]

(*c*) for non-combat damage suffered as a result of the presence of Allied forces in enemy territory.[1]

The organic connexion between reparations, restitution, restoration, retention, and compensation has to some extent been obscured by the drafting technique of both the 1919 and the 1947 Treaties. The grouping of the reparation and restitution clauses in seemingly self-contained parts and sections has led to the erroneous view that private property, rights, and interests (other than looted property) are not directly involved in reparations.[2] It should be evident from the general survey given in the two preceding paragraphs that this is not the case. Reparations are but one way (the collective way) of making good the loss or damage inflicted on (*inter alia*) private property; restitution, restoration, and compensation are other roads in the same network. Conversely, payments and deliveries by enemy *Governments* are not the only way in which reparations are paid; they are also paid in the form of *private* property, rights, and interests which are seizable and retainable by the victors without the intervention of enemy Governments. Finally, reparations for the Allies are not the only reparations stipulated by the Treaties: the compensation payable by enemy Governments to their own nationals for property and services requisitioned, and for non-combat damage caused by Allied forces is a remarkable case in point.

Writing in the 1920–1 volume of this *Year Book* on the treatment of private property in the Treaty of Versailles, the late Dr. Schuster remarked with some diffidence:

> '. . . it remains to be seen whether the particular measures affecting private property provided for by the Peace Treaty ought to form precedents establishing definite rules of International Law on these matters.'[3]

It is just as difficult to answer that question to-day as it must have been immediately after the First World War. In regard to the inviolability of private property in war, the time-honoured controversy of lawyers has not been settled by the literature either of the inter-war period or of the 1939–

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compensation does not arise in relation to Finland, in whose case the Allies have not reserved the right to seize and retain enemy property found within their respective territories.

[1] Art. 76 (2), I.T.; Art. 30 (2), R.T.; Art. 28 (2), B.T.; Art 32 (2), H.T. There are no corresponding provisions in the Finnish Treaty.

[2] In the Italian Treaty, reparations and restitution, together with the renunciation of claims by Italy, are covered in Part VI, which is headed 'Claims Arising out of the War'; restoration, retention, and debts are grouped together in Part VII, under the heading 'Property, Rights and Interests'. In the four other treaties, however, the renunciation of enemy claims has parted company with reparations and restitution and is found together with restoration, retention, debts, and a number of other subjects under the omnibus heading 'Economic Clauses'.

[3] At p. 168.

45 war.[1] Admittedly, we now have before us the precedents of two major and multilateral peace settlements, linked by a striking similarity of general pattern, but as far as the treatment of private property and interests is concerned, closer examination reveals many divergences not only in detail but also in principle. In some respects these divergences are so fundamental[2] that it is difficult to escape the conclusion that the technique of dealing with private property after a total war is still in a state of flux.

2. *Restitution*

By a Declaration dated 5 January 1943[3] the United Nations issued a formal warning to all concerned and, in particular, to persons in neutral countries that they intended to do their utmost to defeat the methods of dispossession practised by the Axis and that accordingly they reserved the right to declare invalid any transfers of or dealings with private property, rights, and interests in territories which had come under the occupation or the direct or indirect control of the enemy; transactions 'apparently legal in form' or purporting to be voluntarily effected were singled out for specific mention. That Declaration has now become an integral part of the peace settlement through the device of a clause inserted into the Peace Treaties (except the one with Finland) in which the enemy states signify their formal acceptance of the principles of the Declaration and enter into an obligation[4] (directly resulting from those principles) to return 'property removed from the territory of any[5] of the United Nations'.

The obligation to make restitution applies to all identifiable property which was removed by force or duress by *any* of the Axis Powers from the territory of *any* of the United Nations irrespective of any subsequent transactions by which the present holder of any such property has secured possession. This obligation applies, in the first place, to United Nations property which, on the coming into force of the Peace Treaty, was still held in the territory of the enemy state concerned. It also applies, however, to United Nations property held in any third country by persons subject to the jurisdiction of that particular enemy state; accordingly, the Government of the latter is placed under an obligation to take such measures as may be necessary to effect the return of such property.[1]

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[1] See Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1940), p. 168: '. . . nowadays the life and liberty of such private subjects of belligerents as do not directly or indirectly belong to their armed forces and, with certain exceptions, their private property ought to be safe. *That is generally, although in regard to private property not universally admitted.*' See also Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), pp. 188–208; Rabel, *Situs Problems in Enemy Property Measures* (1945); Sommerich, *A Brief against Confiscation* (1945); Rubin, '*Inviolability*' *of Enemy Private Property* (1945).

[2] E.g., the nullification of 'exceptional war measures' in contrast with their express validation in 1919; the pursuit of looted property into the hands of bona fide purchasers in both enemy and neutral countries; the considerable widening of the category of persons entitled to the protection due to Allied nationals; the extension of the benefits of the Peace Treaties to countries which had not been at war with the enemy state.

[3] Misc. No. 1 (1943), Cmd. 6418.

[4] Art. 75, I.T.; Art. 23, R.T.; Art. 22, B.T.; Art. 24, H.T.

[5] In the case of Finland it was sufficient to make provision for the return of property removed from Soviet territory.

The field of application of the general rule which has just been stated, and the supplementary rules to which brief references will be made here below, is in part wider, in part narrower, than the application of the corresponding provisions of 1919. First, while the 1919 Treaties did not purport to pursue looted property beyond the territory of the enemy state and its allies,[2] the present settlement lays claim to the restitution of all identifiable property[3] *wherever* it may be found. The obligation imposed on enemy Governments to compel all persons under their jurisdiction to surrender property held by them in third countries has no parallel in the previous settlement; nor did the Allies of the First World War make any attempt comparable to the Declaration of 5 January 1943, and the arrangements made pursuant to it, to enlist the co-operation of neutral states in the search for, and recovery of, Allied property. On the other hand, the principle that where restitution of the original loot is impossible there should be restitution in kind is now restricted to a much more limited field than it was in the previous settlement.[4] In fact it only appears in the form of two specific rules.

The first of these is written into the Italian, Bulgarian, and Hungarian Treaties.[5] It provides that where it is found impossible to return individual objects of artistic, historical, or archaeological value, objects of the same kind and of approximately equal value are to be transferred, in so far as such objects are obtainable in the enemy state concerned.[1] The second rule—confined to the case of Italy[2]—refers to monetary gold looted from United Nations territory. The Italian Government is made responsible not only for gold looted *by* Italy, but also for all monetary gold wrongfully removed *to* Italy, no matter by which Axis Power the removal was effected, regardless of whether any part of the gold was, in effect, used by Italy and irrespective of any transfers or removals of gold from Italy to any other Axis Power or any neutral country. In so far as the original loot no longer exists in Italy, the latter has to transfer an amount of gold equal in weight and fineness to that looted or wrongfully removed. The second part of the rule is particularly interesting, inasmuch as it establishes responsibility on a purely territorial, as distinct from a delictual, basis. In essence, these provisions of the Treaty amount to the proposition that a belligerent may be held fully accountable for property looted by its allies, even if it should have done no more than harbour the loot for some time during the war. The proposition is a bold one, but it fits well into that general trend of modern peace-making technique which seeks to widen the joint responsibility of co-belligerents.

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[1] The combined effect of these provisions may be illustrated as follows: assuming that French property looted by German forces has ultimately passed into the ownership of a person resident in Roumania, and on 15 September 1947 was still held in Roumanian territory, the responsibility for restitution rests clearly with the Roumanian Government. Should, however, the Roumanian owner have, at any time before 15 September 1947, transferred the property to Italian territory without changing residence, both the Roumanian *and* the Italian Government will be responsible for restitution. The former will have to take measures designed to compel the Roumanian owner to surrender both title and possession in Italy; the latter will have to take measures *in rem*, operating directly on the property. Should the Roumanian owner have taken up residence in Italy under conditions which remove his person from Roumanian jurisdiction, the responsibility of the Roumanian Government will have come to an end and passed entirely to the Italian Government. Should both the property and the residence of the owner have been transferred to neutral territory, the legal position will depend on the existence or absence of special arrangements between the neutral state and the Allied and Associated Powers. For the gist of such arrangements, notably with Switzerland, see *infra*, p. 279.

[2] Art. 238, T.V.; Art. 184, Treaty of St. Germain; Art. 168, Treaty of Trianon.

[3] The use of the general term 'all identifiable property' is new in itself; the T.V. enumerated certain categories of properties which had to be restituted. As, however, the list given in Art. 238, T.V., included, in addition to cash, securities, and animals, also the omnibus term 'objects of every nature', the difference between the terms used in 1919 and 1947 is one of phraseology rather than of substance.

[4] Under Art. 2, Annex IV of Part VIII (Section I), T.V., the Allied Governments were entitled to have animals, machinery, equipment, tools, and like articles of a commercial character which had been *seized*, consumed, or destroyed by Germany, or destroyed in direct consequence of military operations, replaced by animals and articles of the same nature—at any rate to the extent necessary for meeting immediate and urgent needs.

[5] Art. 75 (9), I.T.; Art. 22 (3), B.T.; Art. 24 (3), H.T.

The third and, from the practical angle, most important departure from precedent is the unequivocal formulation of the rule that the obligation to make restitution is irrespective 'of any subsequent transactions by which the present holder of property has secured possession'. The Treaties of 1919 ordered the restitution of identifiable property without any reference to 'subsequent transactions'; and they used terms wide enough[3] to be so construed that no exception in favour of private owners was intended. In actual practice, however, the obligation was not so construed by either the Allies or the enemy, and no attempt was made to suspend the operation of municipal rules protecting bona fide holders.[4] The legal position created by the Paris Treaties is fundamentally different. Such protection as bona fide holders of property are normally entitled to under the laws of Italy,

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[1] Within its own limited field the present rule is a noteworthy extension of the principle underlying Art. 247, T.V., which required Germany to furnish to the University of Louvain manuscripts, incunabula, printed books, maps, and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain.

[2] Art. 75 (8), I.T.

[3] E.g., Art. 238, T.V.: '. . . Germany shall effect . . . restitution in cash of cash taken away, seized or sequestrated and also restitution of animals, objects of every nature and securities taken away, seized or sequestrated, in the cases in which it proves possible to identify them in territory belonging to Germany or her allies.'

[4] Art. 241, T.V., Art. 187, Treaty of St. Germain, and Art. 171, Treaty of Trianon, required the enemy states to pass, issue, and maintain in force any legislation, orders, and decrees that may have been necessary to give complete effect to the reparation and restitution clauses; but none of the Central Powers passed, or was invited to pass, legislation invalidating the title of bona fide purchasers.

Roumania, Bulgaria, and Hungary is suspended by the operation of the Treaties themselves,[1] at any rate for the purpose of Allied claims presented within six months from the coming into force of the Treaties; and a similar suspension of municipal rules has taken place in those neutral states which have chosen to pass special legislation in accordance with the United Nations Declaration of 5 January 1943. These new methods of pursuing looted property into the hands of third parties raise several points of principle and practice which will now be considered.

The United Nations Declaration paid due attention to the fact that in many cases the Axis Powers had abandoned the cruder forms of looting in favour of transactions which were apparently legal in form and, indeed, purported to be normal and voluntary transfers of property. It was to be expected, therefore, that in conjunction with the invalidation of such transactions, the Peace Treaties would make some arrangements in regard to the purchase price or other consideration the Allied owner may have received in exchange for his property. Surprisingly enough, none of the Treaties takes any notice of the problem: the claim to the restitution of identifiable property is absolute, and there is no provision whatsoever requiring the claimant to surrender or account for the consideration received. Unless a remedy is found by Allied municipal legislation (for example, by making the return of property recovered by Government action conditional on such repayment as may be equitable in the circumstances of the case[2]) there may arise many cases of unjustified enrichment—a result which it would be difficult to uphold on any established principle of private international law. With the bias shown by the Treaties in favour of the dispossessed United Nations owner there must be contrasted their apparent lack of concern for the legitimate interests of enemy nationals who will be expropriated as a result of the general invalidation of 'subsequent transactions'.

It has already been noted[3] that as a matter of principle the Treaties do not leave it to the discretion of ex-enemy Governments whether or not these will compensate their own nationals for losses directly attributable to the war: there are imperative provisions for the payment of compensation in respect of private property taken for reparation purposes in enemy or United Nations territory, of supplies and services requisitioned by

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[1] Through the ratification of the Treaties by the ex-enemy states the rule suspending the protection of 'subsequent transactions' is deemed to have become part of their municipal law; the 1919 technique (see p. 277, n. 4, *supra*) of requiring the ex-enemy states to pass special legislation in order to give effect to the reparation and restitution clauses has been dropped.

[2] It is clear that a simple rule requiring every claimant to surrender the full consideration received by him at the time of dispossession would be too rigid. Due account of this difficulty has been taken in Art. 5 of the Swiss Decree of 10 December 1945 (see p. 279, *infra*), which stipulates that 'if the expropriated owner . . . has received any consideration whatsoever, restitution may be made dependent on the repayment of a sum of money which is not in excess of the consideration received by him'.

[3] See pp. 273–4, *supra*.

Allied forces and of non-combat damage suffered in consequence of the presence of Allied forces in enemy territory. Yet the Treaties provide no protection at all for enemy or, indeed, neutral nationals who may have acted in perfectly good faith when they acquired property which now turns out to have been wrongfully removed from United Nations territory.

Admittedly, each of the ex-enemy states is free to provide by municipal legislation for the compensation of bona fide owners and creditors. It is equally clear, however, that if they were to deny such compensation, they would still remain within the established rules of international law; for 'international law treats a State as being invested for international purposes with complete power to affect by treaty the private rights of its nationals, whether by disposing of their property, surrendering their claims . . . or otherwise' and 'undoubtedly, a State can compulsorily acquire the property of its nationals *with or without compensation*'.[1] That being so, are the Peace Treaties morally right in not only tolerating, but positively demanding certain confiscatory measures against private property without ensuring that no such measures shall be taken without equitable compensation? The question is a delicate one, in view of the marked disapproval that British and American courts had so often expressed between the two wars when confronted with the confiscatory legislation of certain foreign countries and, more particularly, with that of the Soviet Union.

Concerning the restitution of United Nations property eventually transferred to neutral territory, the Treaties contain a rule of limited application only: the enemy Governments are required to ensure (as far as it lies within their power) the return of looted property held in third countries by persons subject to their jurisdiction. For a fuller and more effective regulation of the problem the Allies have looked to the neutral states themselves. It is impossible, within the limited space of this article, to attempt a comparative analysis of all the municipal rules that have been brought into force in the various neutral states. It appears to be useful, however, to insert here a short summary of at least the Swiss regulations; they are particularly important in view of the widespread (and apparently well-founded) belief that most of the Axis loot that ever found its way to neutral territory had been directed to Switzerland. Under a Decree of the Swiss Federal Council issued on 10 December 1945, all United Nations Governments and nationals can claim before the Swiss courts the restitution of movables and securities that were wrongfully removed from Axis-occupied territory between 1 September 1939 and 8 May 1945, the effective date of Germany's capitulation.[2] If the holder of the property in Switzerland is a bona fide purchaser for value, he is entitled to claim from his immediate predecessor in title the refund of the purchase price paid; the immediate predecessor in title (provided he himself was a bona fide purchaser) has a similar claim against his own predecessor. This chain of claims comes to an end when, eventually, a mala fide holder is reached; if he is insolvent or outside the jurisdiction, the Court has power to award, at the expense of the Swiss Treasury, equitable compensation to the last bona fide purchaser in the chain. The same rules apply, *mutatis mutandis*, to bona fide third parties (including creditors) who may have acquired rights *in rem* in respect of the property concerned. The onus of proving that the property had been taken away by force or duress is on the claimant. If the claimant received any compensation at the time of dispossession, restitution can be made dependent on the payment of a sum which is not in excess of such compensation.

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[1] McNair, *Legal Effects of War* (2nd ed., 1944), pp. 391–3.

[2] Claims presented before 31 December 1947 went direct to the Supreme Federal Court;

From the point of view of international law, the most remarkable feature of these rules is the acceptance by the Swiss Government of subsidiary responsibility for a financial loss that would otherwise be suffered by the bona fide purchaser whose immediate predecessor in title is insolvent or outside the jurisdiction. In that this responsibility is purely 'territorial' and not delictual, it is closely akin to the provisions of the Italian Peace Treaty relating to monetary gold looted from United Nations territory.[1] But, clearly, the Swiss precedent goes much further than the Italian. In the case of a belligerent it is comparatively easy to argue that a responsibility of this kind, purely 'territorial' though it may be in appearance, is not essentially different from joint responsibility for the delicts of a co-belligerent. In the case of a neutral the argument does not apply; and, indeed, it is difficult to find a legal (as distinct from a political) explanation for the Swiss precedent without resort to a new principle of international law—'a more comprehensive inter-state idea of law and justice' as it has been called by a distinguished Swiss jurist.[2]

Another noteworthy point concerning the Swiss regulation is its confiscatory effect notwithstanding the ultimate financial responsibility accepted by the Swiss Treasury. In the first place, not even a bona fide purchaser for value can claim more than the refund of the purchase price paid by him; if that be less than the actual value of the property at the time of restitution, he will have been 'expropriated' to the extent of the difference. Secondly, not even a bona fide purchaser for value has an absolute claim against the Swiss Treasury; whether or not he is entitled to compensation

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claims presented after that date go to courts having jurisdiction in accordance with the ordinary rules of civil procedure.

[1] See p. 277, *supra.*

[2] Weiss, 'Beutegüter aus besetzten Ländern und die privatrechtliche Stellung des schweizerischen Erwerbers', in *Schweizerische Juristenzeitung*, 15 September 1946.

is a matter of judicial discretion. Thirdly, the claim against the Treasury is for equitable compensation only; the amount to be awarded may be less than the full value of the consideration given by the claimant.[1]

The obligation of the enemy states to make restitution embraces both private and public property. No exception is made in respect of such public property as can be lawfully seized and, indeed, appropriated by an army of occupation under the Hague Convention of 1907.[2] On the other hand, the obligation only covers property that was removed 'by force or duress'. It is clear from the general context of the Treaties that this term also covers cases where property was taken away, ostensibly, with the consent of the lawful owner or holder; and, indeed, cases where, to all appearances, due consideration was given. It must, however, be patent from the circumstances of the case that the consent of the owner or holder had been obtained by misrepresentation or threats.[3] By express provision of the Treaties, the burden of proving that the property was not removed by force or duress rests on the enemy Governments; in other words, the presence of United Nations property in enemy territory raises a (rebuttable) presumption that it had been wrongfully removed. The only burden of proof to be discharged on behalf of the United Nations claimant is that of identifying the property and proving original ownership. It follows from the general rules of private international law[4] that, in disputed cases, the question whether the property was removed by force or duress must be determined according to the law of the country from which the property had been taken away.

The Treaties provide that claims for the restitution of property shall be presented to the enemy Government concerned by the *Government* of the country from whose territory the property was removed; and further, that the period during which such claims may be presented shall be six months from the date of the coming into force of the Treaties. It is not clear from either the Treaty texts or the *travaux préparatoires* whether action through their respective Governments is the only way in which dispossessed owners can enforce their claims to restitution, or if they have an option to proceed direct against the present holders of their property in enemy territory. It is submitted that, in the absence of any express waiver in the Treaties, there is no reason why private individuals or corporations should not pursue their claims direct; this view is strongly supported by the municipal legislation of the neutral states which clearly recognizes the original owner's independent right of action.[1]

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[1] The situation is different in Sweden. Under the Swedish law of 29 June 1945 a bona fide purchaser compelled to surrender property of United Nations origin has an immediate and absolute claim for compensation against the Swedish Treasury; he need not first try to enforce a claim against his immediate predecessor in title.

[2] Under Art. 53 of the *Regulations Respecting the Laws and Customs of War on Land* (Annex to Hague Convention No. IV of 1907) an army of occupation can lawfully take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies and, generally, all movable property belonging to the state which may be used for the operations of the war. Cf. Oppenheim, op. cit., p. 309: 'Movable public enemy property may certainly be appropriated by a belligerent provided that it can directly or indirectly be useful for military operations.'

[3] Art. 1 of the Swiss Decree of 10 December 1945 draws a distinction between (i) property looted in occupied territory contrary to international law; (ii) property or possession lost through force, sequestration, requisition, and similar acts of the Occupying Power; and (iii) voluntary surrender of assets under the influence of misrepresentation or reasonable fear induced by the Occupying Power or its military or civilian organs. The distinction is largely one of terminology; the same substantive law (i.e. the recognition of a claim to restitution) is applied to all three categories. It is submitted that categories (ii) and (iii) do not import fresh elements into the existing rules of international law, but only exemplify particular ways in which the Hague Regulations have, in fact, been violated.

[4] Westlake, *Private International Law* (1925), pp. 202 ff.; Schnitzer, *Handbuch des Internationalen Privatrechts*, vol. ii (1944), p. 472.

It is noteworthy that a United Nations Government claiming restitution need not prove that the property in question was owned by one of its nationals; it is sufficient to show that the property had been removed from its territory. In other words, restitution claims are based exclusively on the territorial and not on the personal jurisdiction of governments. In the case of rolling-stock, a claimant Government need not even prove removal from its own territory. The Treaties operate on the presumption—and in this case it is a presumption *juris et de jure*—that rolling-stock was removed from the territory to which it originally belonged.

It has already been noted that the joint responsibility of Axis co-belligerents is one of the guiding principles of the restitution clauses. A remarkable corollary to that principle is found in a rule, common to all five Treaties,[2] whereby such identifiable property of the enemy states and their nationals as had been removed by force or duress to Germany by German forces or authorities *after* the Armistice with the enemy state concerned, shall also be eligible for restitution. The Treaties do not contain detailed regulations concerning the time and procedure of such restitution, but leave these to be determined by the Powers in occupation of Germany.

3. *Allied property in enemy territory*

The main rule of the Treaties governing this subject draws a distinction between 'legal rights and interests' on the one hand and 'property'[3] on the other. The former have to be restored as they existed at certain specific dates; the latter has to be returned as it existed at the time of the coming into force[1] of the Treaties. The distinction has considerable practical importance. It means, in effect, that the protection afforded to 'legal rights and interests' is stronger than that afforded to 'property'; for while only partial compensation is due for property that cannot physically be returned, legal rights and interests must, in any circumstances, be restored in full. This is a somewhat paradoxical position, as it is not customary for rights *in rem* to enjoy a lesser degree of protection than rights *in personam.*

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[1] See p. 279, *supra*.

[2] Art. 77, I.T.; Art. 28, R.T.; Art. 26, B.T.; Art. 30, H.T.; Art. 28, F.T.

[3] Property, in the context of the main rule, means 'all movable or immovable property, whether tangible or intangible, including industrial, literary and artistic property as well as all rights or interests of any kind in property'. 'Legal rights and interests' are not specifically defined, but it follows from the exhaustive definition of 'property' that they do not include rights and interests in property.

In the case of Italy, Bulgaria, and Finland, 'legal rights and interests' are to be restored as they existed on the outbreak of hostilities between these countries and at least one of the United Nations.[2] In the cases of Roumania and Hungary, the operative date is 1 September 1939. Considering that Roumania did not enter the war until 22 June 1941, and Hungary until 10 April 1941, the date chosen is not by any means self-explanatory.[3] In so far as the choice of a date prior to the outbreak of hostilities was intended to protect United Nations interests against discriminatory regulations brought into force during the pseudo-neutrality of Roumania and Hungary, the remedy may yet prove to be more harmful than the disease, inasmuch as it reduces the degree of protection afforded to such rights and interests as may have increased in content and value between 1 September 1939 and the effective date of Roumanian and Hungarian belligerency. In addition, somewhat unnecessary complications are likely to arise with regard to rights and interests which did not exist on 1 September 1939, but were acquired between that date and the commencement of hostilities. From the point of view of international law, the precedent is interesting in that it provides yet another example of a belligerent's responsibility being made retroactive.

The subsidiary rules designed to give effect to the main rule stated above fall into a pattern that differs considerably from the 1919 precedent. In the first instance, where property could not be returned *in specie*, the Treaty of Versailles left it to Mixed Arbitral Tribunals to determine the compensation payable to the dispossessed owner. In the present Treaties the rate of compensation is fixed; it amounts to two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. From the point of view of international law, the acceptance of less than full compensation creates no precedent. The delegates of the Great Powers at the Peace Conference all insisted most emphatically[1] that, as a matter of legal principle, full compensation ought to be paid and that their departure from that principle was due to political and economic considerations only.

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[1] The language of the Treaties is somewhat ambiguous; it speaks of the return of property '*as it now exists*'. That would make it, at first sight, arguable that property must be returned as it existed on 10 February 1947—the day when the Treaties were signed. Such an interpretation would, however, be irreconcilable with a subsidiary rule, common to all five Treaties, whereby enemy Governments have to nullify all measures taken by them against United Nations property between the commencement of hostilities and the coming into force of the Treaties. The reference to the latter date would be meaningless if the main rule had been intended to petrify the status of United Nations property as it existed on 10 February 1947.

[2] 10 June 1940 in the case of Italy; 24 April 1941 in the case of Bulgaria; 22 June 1941 in the case of Finland.

[3] The draft Peace Treaties submitted to the Peace Conference by the Council of Foreign Ministers referred to the correct dates, i.e. 22 June 1941, in the case of Roumania, and 10 April 1941, in the case of Hungary. These dates were changed by the Economic Commission for the Balkans and Finland at the request of the Polish delegation. Although the reasons for the request and its acceptance are not stated in the Report of that Commission, it is fairly safe to assume that they were concerned with the protection of Polish interests in Hungary and Roumania as they existed on the day of the German invasion of Poland.

In the second place, in the Treaty of Versailles the Allies reserved the right to compensate their own nationals in Allied currencies and to debit Germany with the payments so effected. Under the present settlement (save for any special arrangements between dispossessed owners and the enemy Governments concerned) compensation is payable exclusively in the currency of the enemy state; it is freely usable there, but its transferability depends on the foreign exchange-control regulations of the enemy state concerned.

Thirdly, under the Treaty of Versailles compensation was payable only in respect of damage or injury suffered through the application either of exceptional war measures or of measures of transfer. Under the present settlement, compensation is payable for *any* injury or damage resulting from the war, including damage suffered through the military operations of the Allies themselves. The principle that a belligerent is not estopped from claiming compensation for injury suffered through its own warlike actions is thus firmly reasserted.

In view of the fact that the terms on which United Nations owners are entitled to compensation are somewhat unattractive, it is not surprising that, in contrast with the Treaty of Versailles, the bias of the present Treaties is definitely for the return of property *in specie*. Accordingly, where the Treaty of Versailles expressly validated all the exceptional war measures taken by Germany against Allied property,[2] the present Treaties decree the nullification of all measures (including seizures, sequestration, or control) taken against United Nations property in enemy territory; they even provide that, notwithstanding the return of property *in specie*, any loss or damage (other than a loss of profit) resulting from the application of special measures must be made good in the form of an indemnity payable in local currency. Again, where Allied property had been subjected to a measure of transfer, the Treaty of Versailles accepted the transfer as final and binding,[2] subject to an option for the original owner to claim restitution in lieu of compensation. The present Treaties insist that the enemy Governments shall invalidate all transfers involving property, rights, and interests belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war. In one case they even provide for the invalidation of transfers effected before the war. Under the Peace Treaty with Hungary,[1] where the property of Czechoslovak nationals was transferred after 2 November 1938 (the date of the first 'Vienna Award') as a result of force, duress, or measures taken under discriminatory internal legislation by the Hungarian Government or its agencies in annexed Czechoslovak territory, such transfers must now be annulled.[2]

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[1] *Report* of the Economic Commission for Italy; *Report* of the Economic Commission for the Balkans and Finland.

[2] Art. 297, T.V.

United Nations property, rights, and interests must be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war; nor are the enemy Governments allowed to impose any charges in connexion with their return. In so far as any exceptional taxes, levies, or imposts had been imposed on capital assets, between the Armistice and the coming into force of the Treaties, for the specific purpose of meeting charges arising out of the war or the costs of occupying forces or of reparations, United Nations nationals and their property must be exempted therefrom, and any sums that may have been paid must be refunded. Apart from this provision, the Treaties do not stipulate any discrimination in favour of United Nations property, rights, and interests. More particularly, they do not seek to protect them against measures of nationalization or against the expropriation of land within the framework of a general land reform. On the other hand, it is obvious that there must be no discrimination against United Nations property. Admittedly, there is no express prohibition comparable with the rules[3] of 1919 under which enemy Governments were precluded from subjecting Allied property, rights, or interests to any measures 'in derogation of property rights' which were not applied equally to the property, rights, and interests of ex-enemy nationals. It follows, however, clearly enough from the general context of the present Treaties that in no event must United Nations nationals receive less favourable treatment than ex-enemy nationals with respect to compensation or otherwise.[4] Where measures of nationalization or expropriation were applied to United Nations property before the Treaties came into force and the compensation paid or payable is less than two-thirds of the sum necessary, at the date of payment, to purchase similar property, the dispossessed owner has, it is submitted, a good claim to the difference.

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[1] Art. 26 (3), H.T.

[2] The Hungarian Treaty has no corresponding provision for the case of Roumanian nationals who may have suffered measures of transfer in Roumanian territory (Northern Transylvania) occupied by Hungary under the second 'Vienna Award' of 30 August 1940; under Art. 26 (5) of the Treaty the Hungarian Government is, however, responsible for all damage to United Nations property that occurred, as a result of the war, while Northern Transylvania was subject to Hungarian authority.

[3] Art. 298, T.V., and corresponding provisions in the other Peace Treaties.

[4] Under Art. 78 (4) (*a*), I.T., United Nations nationals shall in no event receive less favourable treatment than Italian nationals with respect to the compensation payable in all cases where property cannot be returned or where injury or damage was suffered as a result of the war; under

The categories of persons entitled to the special protection due to United Nations nationals are considerably wider than they were under the 1919 settlement. According to the definition written into the Treaties, the term 'United Nations nationals' means (*a*) individuals who were nationals of any of the United Nations and (*b*) corporations or associations which were organized under the laws of any of the United Nations at the coming into force of the Treaties provided that they also had this status on the date of the Armistice. From the point of view of international law this definition has a twofold interest.

In the first place, it provides a notable exception to the general rule that the nationality of a claim must be continuous from the date of damage to the date of the award.[1] It is clear that where the owner of property which suffered damage during the war was an enemy or neutral national at the outbreak of hostilities, but became a naturalized subject of one of the United Nations before the Armistice, he will be entitled to compensation on the same terms as if he had been a United Nations national when war broke out; in other words, a precedent has been created for the retroactive effect of naturalization on international claims. Apart from this exception, however, the Treaties uphold the doctrine of the continuous nationality of claims; they provide in particular that the successor in title of a United Nations owner can only claim the protection of the Treaties if he himself is a United Nations national within the terms of the definition.[2]

In the second place, it is noteworthy that a purely external test (organization under the laws of any of the United Nations) has been chosen to determine the nationality of corporations and associations, and that no reference is made to the subsidiary criteria of *siège social* and 'control'.[3] At first sight the results seem to be anomalous: a company organized under the laws of one of the United Nations becomes eligible for the special

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Art. 78 (4) (*d*), a special indemnity is due for loss or damage suffered by United Nations nationals under 'special measures' which were not applicable to Italian property; under Art. 82 (1) (*c*), United Nations nationals are entitled to national and most-favoured-nation treatment in all matters pertaining to commerce, industry, shipping, and other forms of business activity (other than commercial aviation) in Italy. There are parallel provisions in the four other Treaties.

[1] Oppenheim, op. cit., vol. i, pp. 314–15.

[2] Art. 78 (9) (*b*), I.T.; there are identical provisions in the four other Treaties.

[3] Although no room has been found for these subsidiary criteria in the definition of corporate nationality, they have not been abandoned altogether. Under Art. 79 (6) (*g*), I.T., the property of corporations or associations having their *siège social* in ceded territories or in the Free Territory of Trieste is exempted from seizure and retention by the Allies provided that such corporations or associations are not owned or *controlled* by persons in Italy. For the relevance of *siège social* and 'control' to the determination of 'enemy property' see p. 294, *infra*.

protection of the Treaties even though all, or the majority of, its shares may be owned by enemies; conversely, the special protection of the Treaties is denied to a company organized under the laws of an enemy state even though all, or the majority of, its shares are owned by United Nations nationals. However, the anomaly is only apparent. A closer examination of the legal position reveals that, in the first example, the interested Allied or Associated Power is entitled to seize and retain, by way of reparations, the enemy interest in the company. In the second example, the United Nations interest in the company is adequately protected by a rule, common to all five Treaties, whereby United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not themselves United Nations nationals, but have suffered a loss by reason of injury or damage to their property in enemy territory, are entitled to compensation to the extent of two-thirds of the sum necessary to make good the loss suffered. This compensation is calculated on the basis of the total loss or damage suffered by the corporation or association and bears the same proportion to such loss or damage as the beneficial interests of United Nations nationals in the corporation or association bear to the total capital.[1]

This rule (which was not included in the Foreign Ministers' draft of the Treaties, but was added to it by the Peace Conference) was subjected to a great deal of criticism in the course of its passage through the Economic Commissions, notably on the ground that it 'grants special protection and privileges to United Nations nationals who, during the war made upon their country by Fascism, took part in the operations of companies or associations which were solely and openly in the service of Fascism' and for that reason could not stand up to the test of international morality.[2] This criticism was countered on behalf of the United States delegation (which fathered the proposal) by the argument that

> 'since the bulk of modern business enterprise is organised in the corporate form and since in the majority of cases foreign investments are made through corporations or associations organised under the laws of the country in which the physical property is located . . . it is imperative to "pierce the corporate veil" and to ensure that compensation for loss or damage shall accrue to those ultimate United Nations owners upon whom the burden of loss or damage, if uncompensated, would ultimately devolve. The United States Delegation opposes the contention that United Nations nationals who hold interests in property through the corporate form, should be deprived of the benefits of these provisions because of the use of corporate property by enemy States, at a time when they were not under the control of the owners.'[3]

In view of the violent controversy which accompanied the birth of this rule, it may perhaps be pointed out that the principle on which it relies is not altogether new. It was clearly stated in the 1919 Treaties that where Allied nationals were entitled to compensation for damage suffered in enemy territory, the property eligible for such compensation also included any company or association in which Allied nationals were interested.[1]

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[1] Art. 78 (4) (*b*), I.T.; Art. 24 (4) (*b*), R.T.; Art. 23 (4) (*b*), B.T.; Art. 26 (4) (*b*), H.T.; Art. 25 (4) (*b*), F.T.

[2] Statement of the Yugoslav delegation, quoted in the *Report* of the Economic Commission for Italy.

[3] Annex 13 to the *Report* of the Economic Commission for Italy.

Under a rule of interpretation written into all five Treaties, the term 'United Nations nationals' also includes all individuals, corporations, or associations which, under the laws in force in the five enemy states during the war, 'have been treated as enemy'. The text does not say what is meant by treatment 'as enemy' and its silence on this point is likely to give rise to a great deal of controversy in practice. It is submitted that the language of the Treaties supports the following two rules of interpretation:

(*a*) that all individuals, corporations, or associations with which intercourse was prohibited by the Trading with the Enemy legislation of the enemy states must be treated in the same way as United Nations nationals;

(*b*) that in the case of all other individuals, corporations, or associations it is a question of fact whether they 'have been treated as enemy'; the test being the treatment of their property, rights, and interests in enemy territory in a manner *substantially similar* to that applied to United Nations property, rights, and interests.

Under these rules of interpretation it will be found that enemy nationals who were permitted to reside in United Nations territory during the war will, in most cases, be eligible for the protection due to United Nations nationals. On the other hand, it would appear that persons convicted in enemy territory during the war on charges of sympathy with, or of having afforded aid and comfort to, the United Nations are not eligible for such protection; for normally convictions of this kind were founded on the law of treason and like offences, and not on the laws of war applicable to enemies.

It has been suggested[2] that enemy nationals of the Jewish race who had been subjected to measures of expropriation on account of their racial origin are, in principle, entitled to the privileges granted to United Nations nationals, all the more so as, in several enemy states, the discriminatory and confiscatory rules directed against them were founded—expressly or by implication—on the sympathy of the Jewish community with the Allied cause. This argument is contradicted by the very fact that the Roumanian and Hungarian Treaties contain special provisions for the protection of Jewish interests.[3] This protection is very similar to, though not quite identical with that accorded to United Nations nationals. It is clear, however, that it is the only special protection to which members of the Jewish community are entitled in Roumania and Hungary; and it is equally clear from the absence of similar regulations in the three other Treaties that in the case of Italy, Bulgaria, and Finland the restoration of expropriated Jewish property is a matter for domestic legislation.

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[1] Art. 297 (*e*), T.V.; there were corresponding provisions in the other Treaties.

[2] Doroghi, *The Property Rights of Foreign Nationals Protected by the Paris Peace Treaty* (1947).

[3] Under Art. 25, R.T., and Art. 27, H.T., Roumania and Hungary have undertaken that in

The rule that in cases of injury or damage to property, United Nations nationals shall be entitled to compensation at the rate of two-thirds of the sum necessary to make good the loss suffered, applies only to injury or damage directly attributable to the war. Where the loss is attributable to other causes, as, for example, the wrongful action of private individuals or corporate bodies, the injured United Nations owner is free to claim full compensation from the party or parties responsible for the damage. There is nothing in the Treaties that would bar such claims, and the latter are not subject to the short periods of limitation[1] which apply to claims against enemy Governments.

Within the sphere of restoration, United Nations property is not the only concern of the Treaties. They also provide that, after 15 September 1947, the property in Germany of the five ex-enemy states and of their nationals shall no longer be treated as enemy property and that all restrictions based on such treatment shall be removed. The making of detailed regulations for the restoration of Italian, Roumanian, Bulgarian, Hungarian, and Finnish property in Germany is reserved for the Powers in occupation of Germany. Each of the five enemy states has been made to waive, on its own behalf and on behalf of its nationals, all claims against Germany and German nationals outstanding on 8 May 1945, except claims arising out of contracts and other obligations entered into, and rights acquired, before 1 September 1939. The waiver includes debts, all intergovernmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war. The Treaties do not provide for any compensation to be paid to enemy nationals

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all cases where property, legal rights, or interests have since 1 September 1939 been the subject of measures of sequestration, confiscation, or control on account of the racial origin or religion of the owners, the said property, rights, and interests shall be restored together with their accessories or, if restoration is impossible, that fair compensation shall be made therefor. The main difference between this rule and those for the protection of United Nations property lies in the absence of a fixed rate of compensation. Under the same Articles all property, rights, and interests of persons, organizations, or communities which, individually, or as members of groups, were the object of racial, religious, or other Fascist measures of persecution, and remain heirless or unclaimed for six months after 15 September 1947, shall be transferred to organizations in Roumania and, respectively, in Hungary which are representative of such persons, organizations, or communities. The property transferred shall be used for purposes of relief and rehabilitation of surviving members of the persecuted groups, organizations, and communities.

[1] Where United Nations property has not been returned within six months from the coming into force of the Treaties, the owners must make application to the authorities of the enemy state concerned not later than 15 September 1948.

in respect of the loss suffered as a result of this waiver; likewise, no compensation is provided for enemy nationals who may suffer injury on account of the invalidation of transfers involving United Nations property in enemy territory.[1]

4. *Enemy property in United Nations territory*

Each of the Allied and Associated Powers is entitled to seize, retain, liquidate, or take any other action with respect to Italian, Roumanian, Bulgarian, and Hungarian property, rights, and interests which on the coming into force of the Treaties were within their respective territories.[2] On the other hand, the Allied and Associated Powers have undertaken to restore all Finnish property and assets in so far as these were restricted on account of Finland's participation in the war.[3]

The general rule just stated follows closely the text of the 1919 Treaties, but its place in the general structure of the settlement is different. Whereas after the First World War the liquidation of enemy property in Allied territory was considered to be additional to, and not part of, reparations,[4] the present Treaties say the opposite: the retention of enemy property in Allied territory is the only form of general reparations demanded by the Allied and Associated Powers other than the Soviet Union and the neighbours of the enemy states.[5] It follows logically that the range of claims in satisfaction of which enemy property may be retained and liquidated is wider under the present than it was under the previous settlement. Whereas in 1919 these claims were confined, in the first place, to compensation for damage or injury to Allied property, rights, and interests in enemy territory, debts owing to Allied nationals from enemy nationals, and compensation for acts committed by enemy authorities between 31 July 1914 and the effective opening of hostilities,[6] under the present settlement enemy property or its proceeds may be applied by each Allied or Associated Power generally 'to such purposes as it may desire within the limits of its claims and those of its nationals'.[1]

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[1] For a general criticism of the confiscatory effect of the Treaties see p. 279, *supra.*

[2] Art. 79, I.T.; Art. 27, R.T.; Art. 25, B.T.; Art. 29, H.T.

[3] Art. 27, F.T.

[4] Art. 242, T.V., declared that the provisions of Part VIII (Reparation) of the Treaty did not apply to property, rights, and interests subject to retention in Allied territory, nor to the product of their liquidation, except in so far as the Allies were to credit Germany's reparation account with the surplus remaining after the satisfaction of all specific claims chargeable to those sets.

[5] This category includes in the case of Italy: Albania, Ethiopia, Greece, and Yugoslavia; in the case of Hungary: Czechoslovakia and Yugoslavia; in the case of Bulgaria: Yugoslavia and Greece.

[6] Under Art. 4 of the Annex to Arts. 297–8 of the Treaty of Versailles, German assets in Allied territory could be charged, in the second place, with such claims concerning Allied property, rights, and interests as arose from interference with them in the territory of Germany's allies, in so far as such claims were not satisfied otherwise. That precedent for the proposition that enemy private property may be seized in satisfaction not only of claims against the owners' state, but also of claims against an enemy state allied to the owner's state, has not been followed in the present settlement.

Enemy assets (or the proceeds thereof) which are in excess of the amount of claims chargeable to them must be returned. This rule amounts to a noteworthy departure from the 1919 Treaties which provided that the excess value of enemy assets should be credited to the reparations account of the enemy state concerned. The departure is, of course, a logical one; for under the present Treaties the only purpose of the retention and liquidation of enemy property is the satisfaction of claims in the nature of reparations proper. But to whom shall excess assets, or the proceeds thereof, be returned? Direct to the enemy owners, and, if so, with or without notice to their respective Governments? Or shall return be made in all cases through the intermediary of enemy Governments? The problem has considerable importance in practice as, under the foreign exchange-control regulations obtaining in the various enemy countries, the return of private enemy property to the Governments concerned (or, indeed, any notice to them of a return made or about to be made, direct to the owner) is likely to prevent the owner from recovering his assets *in specie*. He will be entitled to a sum of money in local currency; but the assets themselves will have to be surrendered.[2]

The language of the Treaties[3] seems to support the view that return is to be made direct to the enemy owner; that still leaves open the question whether enemy Governments are entitled to notice and particulars. It is arguable, of course, that the Allies, having imposed on enemy Governments the liability to compensate their own nationals for property seized and not returned, are in duty bound—as a matter of international morality rather than law—to supply those Governments with specifications showing not only the amount of enemy private property retained but also the amount of returnable assets. This argument seems to be open to three objections:

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[1] In the Treaty of Versailles the Allied claims for compensation were listed exhaustively in Annex I to Part VIII (Section I) of the Treaty. No such specification is attached to the Paris Treaties; accordingly, *all* Allied claims 'for loss or damage due to acts of war, including measures due to the occupation of territory' may be charged to seized enemy property or the proceeds thereof, provided that the loss or damage was attributable to the enemy state concerned; that it occurred outside the territory of the enemy state; and that the claim in question is not fully satisfied under any other Article of the Peace Treaty. The (British) Treaty of Peace Orders, 1948 (No. 114: Bulgaria; No. 116: Hungary; No. 117: Italy; No. 118: Roumania), have charged the property, rights, and interests of the enemy states and their nationals, found anywhere in 'His Majesty's dominions and Protected Territories except the Dominions', with the amounts due on 15 September 1947, 'in respect of claims by His Majesty (otherwise than in the right of His Government in the Dominions) and by British nationals (other than British nationals ordinarily resident in any of the Dominions)' against the enemy Governments or their nationals excepting claims fully satisfied under any Articles of the Treaty concerned (other than the Article providing for the seizure, retention, and liquidation of enemy assets in the territory of the Allied and Associated Powers).

In relation to Italy, the provisions of the Peace Treaty Order are subject to the Anglo-Italian Financial Agreement of 17 April 1947; see p. 292, n. 1, *infra*.

[2] This would lead to particularly grievous results in relation to liquid funds (gold, jewellery, and securities) transferred to Allied territory in the years immediately before the war, in contemplation of impending confiscatory measures directed against the Jewish communities of Roumania and Hungary.

[3] Art. 79 (3), I.T.: 'The Italian Government undertakes to compensate Italian nationals whose property is taken under this Article and not returned *to them*.' There are identical provisions in the Roumanian, Bulgarian, and Hungarian Treaties.

(i) In relation to private property, the 'seizure and retention' clauses of the Treaties do not create inter-state relationships proper, but direct relationships between Allied Governments and individual enemy owners; enemy Governments only enter into that relationship contingently, i.e. in the event of private assets not being returned to the owners.

(ii) There is no customary rule requiring one state to supply another state with information concerning the assets of foreign nationals; an obligation of this kind can only be created by express treaty provision, but no such provision is found in the present Treaties.

(iii) Even if the present Treaties could be so interpreted as to require enemy Governments to supply particulars of the assets held by their nationals in Allied territory, that obligation would not necessarily be reciprocal.[1]

To the general rule that enemy property which is in excess of the Allied claims chargeable to it must be returned, there is an important exception: the Treaties stipulate that there shall be no obligation on any Allied or Associated Power to return industrial property or, indeed, to include such property in determining the amount of enemy property that may be retained. At first sight, this exceptional rule appears to be a somewhat striking departure from precedent; for under the 1919 settlement rights of industrial property were to be re-established or restored, reciprocally by all belligerents, in favour of the persons entitled to the benefit of them at the moment when the state of war commenced.[1] On closer examination, however, there seems to be little difference in the practical results. Even the 1919 rule was subject to the right reserved by the Allies to impose such limitations, conditions, or restrictions on industrial property as they considered necessary for national defence or in the public interest; and it is evident from the present Treaties that the general reservation made in regard to the return of industrial property only serves the purpose of widening the authority of the Allied and Associated Powers to impose limitations, conditions, and restrictions.[2]

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[1] Cf. Art. 10 of the Annex to Arts. 297–8, T.V., requiring Germany 'at any time on demand of any Allied or Associated Power to furnish such information as may be required with regard to the property, rights and interests of German nationals within the territory of such Allied or Associated Power . . .'; no corresponding undertaking was given by the Allied and Associated Powers.

In the 'Agreement relating to Italian property held by the Custodian of the United Kingdom and to the Payment of Debts due from Italy to Persons in the United Kingdom' of 17 April 1947 (*Treaty Series*, No. 31 (1947)—Cmd. 7118) the Government of the United Kingdom undertook to transfer to the Italian Government all the *liquid* assets held by the Custodian as Italian property and to release all *other* Italian property to the original owners. At the same time it undertook to supply the Italian Government with lists of *all* the Italian properties held by the Custodians, including all the particulars available of former ownership, and of the nature and value of each property. Within three months from the dispatch of the last list the Italian Government must specify under which of the following three categories it desires that such non-liquid property should be treated, viz.: (*a*) properties to be realized in order to increase the sterling amount available for the payment of debts; (*b*) properties to be released to the former owners or to their legal representatives; (*c*) properties the disposal of which under (*a*) or (*b*) is to be deferred for further consideration. The United Kingdom Government undertook to realize *any* Italian property at the request of the Italian Government and to pay the proceeds into a Special Account from which will be met debts due from Italy and Italian nationals. The Italian Government undertook to grant compensation to the owners for all property transferred to it in liquid form, but the determination of the conditions of payment has been reserved for the Italian Government.

The enemy character of property, rights, and interests[3] depends in the first place on the nationality of the owner at the date of the coming into force of the Treaties.[4] To this simple rule there is one important addition: all property which has been subject to control in Allied territory by reason of a state of war existing between an enemy state and the Allied or Associated Power having jurisdiction over the property is deemed to be enemy property.[5] To that extent the Trading with the Enemy legislation of the Allied and Associated Powers may be said to have become an integral part of the Peace Treaties.

In the United Kingdom, enemy property thus includes not only the property of enemy nationals but also of any individual who was resident in enemy territory during the war and, with respect to a business carried on in enemy territory, of any individual who carried on that business. Similarly, in the case of corporate owners, the definition embraces not only the property of corporations or associations constituted in, or under the laws of, an enemy state, but (regardless of the place of business) also the property of any corporate or unincorporate body of persons which was controlled by an enemy; and, with regard to a business carried on in enemy territory, the property of any body of persons who carried on that business.[1] In other words, in the United Kingdom the enemy status of corporations is determined by the joint application of the tests of (i) the law under which they are organized, (ii) the place where the business is carried on, (iii) the *siège social*, and (iv) control. In contrast, it has already been noted[2] that the United Nations nationality of corporations depends solely on the external test of their being organized under the laws of one of the United Nations.

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[1] Art. 306, T.V.

[2] Under the (British) Treaty of Peace Orders, 1948 (see p. 291, n. 1, *supra*), the United Kingdom Government has taken power (i) to impose on industrial property acquired by enemies before 15 September 1947 such limitations, conditions, and restrictions as may be deemed necessary in the national interest, and to invalidate such transfers or other dealings effected since the outbreak of war as may be inconsistent with such limitations; (ii) to continue in force, as far as may be necessary, the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, in relation to the ex-enemy Governments and their nationals; (iii) to refuse any application for the grant of a patent for any invention relating to war materials as specified in the Annexes attached to the Treaties, or to revoke a patent already granted for any such invention.

[3] For the purpose of the (British) Peace Treaty Orders, 1948, 'property, rights or interests include real and personal property, and any estate or interest in real or personal property, any negotiable instrument, any debt or other chose in action, and any other right or interest, whether in possession or not.

[4] United Nations nationality depends on the existence of national status at two different dates: the date of the Armistice and the date on which the Treaties came into force; see p. 286, *supra.*

[5] Whether property 'has been subject to control' is, it is submitted, a question of fact and not of law; property which was eligible for control under the Trading with the Enemy legislation of an Allied or Associated Power, but was not, in effect, so controlled cannot be seized under the Peace Treaties, except in cases where exemption from control during the war had been brought about by misrepresentation or fraud.

By express provision of the Treaties, certain categories of enemy property are exempt from seizure and retention. No claim is laid, in the first place, to the property of natural persons who are enemy nationals but have permission to reside within the territory of the country in which the property is located, or to reside elsewhere in United Nations territory. This rule affords adequate protection to pre-war or war-time immigrants and refugees of enemy nationality. No protection is given, on the other hand, to post-Armistice immigrants and refugees; for enemy property which, at any time during the war, was subjected to measures not generally applicable to the property of persons of the same nationality then resident in United Nations territory, is outside the exempted category. Further, the Allied and Associated Powers have waived the right to seize the property of enemy Governments used for consular or diplomatic purposes; property belonging to religious bodies or private charitable institutions, if it is used exclusively for such purposes; literary and artistic property rights; and property rights arising since the resumption of trade and financial relations between the Allied and Associated Powers and the enemy states.

In relation to ceded territories, exemptions are granted in two directions:

(*a*) enemy property situated *in* the ceded territory is exempt, regardless of the residence of the owner;

(*b*) the property, wherever situated, of owners resident or having their *siège social* in the ceded territory is also exempt, but only on condition that the owner, being a natural person, has not opted for the nationality of a former enemy state or, being a corporation or association, is not owned or controlled by persons resident in former enemy territory.

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[1] Art. 2 (1) of the Trading with the Enemy Act, 1939.

[2] See p. 286, *supra*.

5. *Contracts*

The principal rule[1] common to all five Treaties declares that any contract which required for its execution[2] intercourse between parties who had become enemies[3] is dissolved as from the time when any of the parties thereto became enemies.

The rule quoted in the preceding paragraph differs substantially from the corresponding rule of the 1919 settlement[4] in that it maintains in force all contracts which did not for their execution require intercourse between the parties. Under the Peace Treaties with the Central Powers, contracts were dissolved without regard to the element of intercourse as long as trading between the parties had been prohibited or had otherwise become unlawful.

The prominence given to the test of intercourse has changed the position in two directions. In the first instance, under the 1919 Treaties it was highly controversial[5] whether a pre-war contract was to be deemed dissolved merely because trading had in general become unlawful between the parties; or if dissolution was dependent on trading having become unlawful with respect to that particular contract. No such difficulty should arise under the present Treaties; they make it quite clear that the decisive factor is not the general prohibition of trading but its effects (if any) on a given contract.

In the second instance, the new settlement maintains in force a much wider range of contracts. This applies, in the first place, to contracts which provide for the suspension of performance in case of war. Under the 1919 rules, contracts were dissolved notwithstanding the suspensory clause;[6] under the new rules they will be saved by it. Whether this encouragement given to contractual arrangements which look ahead to the resumption of performance immediately upon the termination of war is a healthy development in peace-making technique is perhaps open to question. The argument in favour of it seems to rest on the thesis that the less a state of war between Governments is allowed to interfere with private business, the nearer we draw to the old and not unattractive conception that private rights should be immune from the dislocations of war. On the other hand, there is the no less weighty argument that neither international peace nor national security is necessarily well served if powerful combinations, particularly in the armaments industries, can safely engage in long-term cartel and similar arrangements under the shelter of suspensory clauses.

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[1] By a strange trick of drafting the principal rule is not in the main body of the Treaties but in an Annex, whereas an exception to the main rule (the maintenance of pecuniary debts) is regulated in the main Treaty texts.

[2] It is not clear from the language of the Treaties whether a contract is vitiated merely because its execution would have required intercourse in normal circumstances, or if it is only vitiated where intercourse was in fact required during the war. The second interpretation is easier to reconcile with the general principle of *pacta sunt servanda*.

[3] For the purposes of this rule, 'natural or juridical persons shall be regarded as enemies from the date when trading between them shall have become unlawful under laws, orders or regulations to which such persons or the contracts were subject'. Art. 1, Section D, Annex XVI, I.T. In adopting a specific definition of enemy status for the purposes of pre-war contracts, the 1947 settlement follows the 1919 precedent. The definition just quoted is modelled on Art. 1 of the Annex to Arts. 299–303, T.V.

[4] Art. 299, T.V., and identical rules in the other Peace Treaties.

[5] Wolff, *Problems of Pre-War Contracts in Peace Treaties* (1946), pp. 34 ff.

[6] McNair, op. cit., p. 94. For the practice of the Mixed Arbitral Tribunals see *Braunstein* v. *Ölwerke Germania* (*Recueil des Décisions des Tribunaux Arbitraux Mixtes*, vol. ix, pp. 443 ff.).

The second important category of cases affected by the test of intercourse includes a wide variety of restrictive covenants. After the First World War the English courts considered that restrictive covenants in favour of enemies were discharged, even where no intercourse between enemies was involved.[1] Under the 1947 rule, such covenants would have to be upheld, notwithstanding the principle of English common law[2] that contracts the continued existence of which would confer an immediate or future benefit on an enemy, must be deemed to be dissolved.

In granting exemptions from the main rule of dissolution, the present Treaties do not follow the technique of 1919. The Treaty of Versailles established exceptions in two ways. First, it provided generally for the maintenance of contracts required to be carried out in the public interest by an Allied or Associated Government of which one of the parties was a national.[3] Secondly, certain classes of contracts, exhaustively listed in an Annex to the Treaty, were declared to remain in force, subject only to the terms of the contracts and to the application of domestic laws made during the war by the Allied and Associated Powers.[4] In the Paris Treaties both of these methods have been abandoned in favour of a system of exceptions based on four distinct principles accompanied by a somewhat vague rule of interpretation. These are as follows:

(i) All transactions lawfully carried out in accordance with a contract between enemies are valid, provided that they have been carried out with the authorization of the Government of one of the Allied and Associated Powers. Under the 1919 Treaties the authority of *any* belligerent Power was sufficient to validate such transactions;[5] this mutuality has now been abolished.

(ii) There will remain in force such parts of any contract as are severable and have not required for their execution intercourse between enemies. This rule is, however, subject to the terms of the contract and to the municipal law of the Allied and Associated Powers having jurisdiction over the contract. It would thus appear that where part of a contract is severable, according to the municipal law of a contracting party of Allied nationality, it will be upheld, even if the laws of the enemy state concerned do not operate with the doctrine of severability. These rules are substantially identical with those of the 1919 settlement.[1]

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[1] McNair, op. cit., pp. 96 and 293–4.

[2] *Ertel Bieber & Co.* v. *Rio Tinto Co.*, [1918] A.C. 260, and *In re Badische Co.*, [1921] 2 Ch. 331.

[3] Art. 299 (*b*), T.V.

[4] The principal exempted classes were: contracts for the transfer of real or personal property; leases of real property; contracts of mortgage, pledge, or lien; mining concessions; and contracts with, and concessions granted by, public authorities.

[5] Art. 299 (*e*), T.V.

(iii) Pecuniary debts are not affected[2] by the existence of the state of war in itself, provided that they arise out of obligations and contracts which existed, and rights which were acquired, before the existence of a state of war, and that they became payable prior to the coming into force of the Peace Treaties. The first condition is self-explanatory. The second condition, it is submitted, must be taken to mean that debts maturing *after* the coming into force of the Treaties are enfocreable as a matter of course.[3] The rule is altogether a considerable improvement on the 1919 precedent, which only provided for the saving of debts or other pecuniary obligations arising out of 'any act done or money paid' under a pre-war contract.[4]

(iv) If, under a contract dissolved by the operation of the general rule,[5] a party received a sum of money by way of advances or payments on account and has not rendered performance in return, such party is not, by the dissolution of the contract, relieved from the obligation to repay the money received. There was no corresponding rule in the 1919 Treaties.[6]

(v) The Treaties (excepting the one with Finland) contain a somewhat cryptic proviso to the effect that, apart from express provisions, nothing in the Treaties shall be construed as impairing debtor-creditor relationships arising out of pre-war contracts. The *travaux préparatoires* shed no light on the intended operation of this clause, and its language is far too vague to justify the assumption that what is really meant is the saving of claims to specific performance in a manner similar to the saving of pecuniary debts. In all probability, nothing more was intended than a rule of interpretation which, in border-line cases, can be invoked in favour of maintaining rather than wiping out contractual relationships.

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[1] Art. 3 of Annex to Art. 299, T.V.

[2] Except in the case of Finland. As a result of an objection taken by the U.S.S.R. delegation at the Peace Conference, the rule saving pecuniary debts has been left out of the Finnish Treaty, with the highly inequitable result that in Allied-Finnish relations pecuniary debts arising from pre-war contracts are wiped out altogether.

[3] A similar view is taken by Wolff, *Treatment of Pre-War Contracts in the Peace Treaties of Paris* (1947).

[4] Art. 299 (*a*), T.V. For a criticism of this provision see Wolff, *Problems of Pre-War Contracts in Peace Treaties* (1946), p. 77.

[5] See p. 295, *supra*.

[6] It is not clear whether the Treaties *create* a claim for the repayment of advances or only *reserve* it in cases where such claims are allowed by municipal law. Wolff (in *Treatment of Pre-War Contracts in the Peace Treaties of Paris*) favours the second interpretation, mainly on the ground that by referring to '*the* obligation to repay' the Treaties seem to presuppose an obligation existing under municipal law and that more details should have been added if it had been the intention to *create* an obligation. In the view of the present writer, if an obligation existing at municipal law had been presupposed, it would have been more logical to refer to '*an* obligation to repay'; furthermore, the reference to 'amounts received as advances or as payments on account' is specific enough to be consistent with an intention to establish a fresh obligation. This view

6. *Settlement of disputes*

Under the Treaties of 1919, disputes concerning restitution, restoration, contracts, and enemy property were all referred to the same set of authorities, i.e. the Mixed Arbitral Tribunals. The present Treaties have adopted a different method. Disputes relating to enemy property will be settled by the machinery set up for the interpretation and execution of the Treaties in general, i.e. in the first place, the Heads of the Diplomatic Missions of the Principal Allied Powers in the ex-enemy capitals, and, in the second place, a set of commissions of a semi-administrative, semi-judicial character.[1] On the other hand, disputes concerning, *inter alia*,[2] the restitution and restoration of United Nations property and relationships arising from pre-war contracts are referred to so-called Conciliation Commissions.

The settlement of disputes referred to Conciliation Commissions will be in two phases. The first phase, limited to a period of three months from the date when the Commission is seized of the matter, is conciliation in the customary sense of the term. In this phase of the procedure the Commission is composed of an equal number of representatives of the United Nations Government and the enemy Government concerned in the dispute; in the case of Italy, the representation of each Government is confined to one member. If the conciliation is not successful (i.e. if no agreement is reached within three months) either Government may ask for the addition to the Commission of a 'third member'[3] selected by mutual agreement of the two Governments from nationals of a third country. Should the two Governments fail to agree on the selection[4] of the 'third

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seems to be reinforced by the silence of the Treaties on obligations which, at municipal law, undoubtedly arise on the termination of contracts by dissolution or otherwise, e.g. the obligation to carry out the formal winding up of a dissolved partnership. Thus the correct interpretation seems to be that, in respect of unrequited advances or 'on account' payments, there is an *absolute* obligation to refund, whereas other obligations normally arising on the termination of a contract follow the rules of the municipal law applicable to the case.

[1] A more detailed description of this machinery will be found in the present author's note on 'Human Rights in the Paris Peace Treaties', pp. 392–8, *infra*.

[2] The jurisdiction of the Conciliation Commissions covers, in addition to restitution, restoration, and contracts, all disputes concerning industrial, literary, and artistic property, insurance, negotiable instruments, periods of prescription, the war-time judgments of courts in the enemy states, and, in the case of Italy, the economic and financial provisions relating to ceded territories.

[3] The term 'third member' makes sense in the case of Italy, but not in the case of the other Treaties, where the representation of the contending Governments is not restricted to one member for each.

[4] In the case of Italy, a time-limit of two months is prescribed for negotiations on the selection of the 'third member'; there is no corresponding provision in the other Treaties.

member', the appointment will be made, ultimately, by the Secretary-General of the United Nations.[1] With the selection (or appointment, as the case may be) of the 'third member' there begins the second phase of the procedure: henceforth the Commission will act as a mixed arbitral tribunal[2] and will decide the dispute by the majority vote of its members. By an express provision of the Treaties, such decision 'shall be accepted by the parties as definitive and binding'.

The text of the Treaties does not make it clear whether the competence of the Conciliation Commissions is exclusive. The reciprocal undertaking of the High Contracting Parties that the decisions of Conciliation Commissions will be accepted as definitive and binding is not, in itself, conclusive proof of exclusive competence; a similar undertaking was given in the Treaties of 1919,[3] even though the Mixed Arbitral Tribunals had no exclusive competence. Nevertheless, it seems improbable that the present Treaties were intended to preserve the concurrent jurisdiction of municipal courts. In the settlement of 1919 the jurisdiction of the national courts of the Allied, Associated, and Neutral Powers was expressly reserved in certain questions relating to contracts.[4] More important still, the Mixed Arbitral Tribunals were invested with power to review the decision of any competent municipal court given in a case covered by the jurisdiction of the Mixed Arbitral Tribunals and to give redress where such a decision was inconsistent with the provisions of the Peace Treaties.

Both of these rules have been jettisoned by the Paris Treaties, and the absence of the second rule, in particular, lends strong support to the view that the idea of maintaining the parallel jurisdiction of municipal courts must have been abandoned. If there is no machinery for reviewing municipal judgments, there can be no guarantee that divergent decisions will not be given by two equally competent tribunals; such a result could not have been intended.

The Treaties do not lay down expressly that private litigants shall have direct access to the Conciliation Commissions. It is, however, difficult to see how such access could be denied. In the first instance, in all but in name these Commissions are mixed arbitral tribunals of much the same kind as those to which private litigants were readily given access after the

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[1] In the case of Italy, if the two interested Governments fail to agree on the selection of a third member, application for his appointment must first be made to the Ambassadors in Rome of the Soviet Union, the United Kingdom, the United States of America, and France; only if the Ambassadors are unable to agree within a month can either of the interested Governments apply to the Secretary-General of the United Nations. The recommendation of the Peace Conference was for the appointment of the third member by the President of the International Court of Justice, but this recommendation was not accepted by the Council of Foreign Ministers.

[2] The recommendation of the Peace Conference did in fact include the designation 'Mixed Arbitral Tribunals', but this was not accepted by the Council of Foreign Ministers.

[3] Art. 304 (*g*), T.V.

[4] Art. 304 (*b*), T.V.

First World War. Secondly, if the view be correct that the concurrent jurisdiction of municipal courts is now abolished, a denial of direct access to the Conciliation Commissions would debar private claimants from the only judicial remedy that is still available. It would make the enforcement of their claims entirely dependent on the purely administrative decision of their own Governments as to whether or not these claims should be espoused; that, again, is a result that cannot have been intended. Finally, the independent status of the private claimant is recognized in several Treaty provisions, notably in the rule that the United Nations owner of property in enemy territory may agree with the enemy Government concerned upon specific arrangements in lieu of the Treaty provisions for restoration and compensation; and in the procedural rule that, where property has not been returned within six months from the date of the coming into force of the Treaties, application for its return must be made by the claimant direct to the enemy authorities. The position is different in the case of disputes arising from the seizure and retention of enemy property. Contrary to the 1919 precedent, these are not covered by the jurisdiction of the Conciliation Commissions, but have been referred to a procedure designed, primarily, for the settlement of inter-state controversies relating to political and economic questions. This procedure, which, at any rate in its initial stages, is purely diplomatic, is not easily adaptable to the settlement of individual claims and, accordingly, it is unlikely that any right of access will be granted to private claimants. In any case, the interests of the latter are adequately protected by the access they undoubtedly have to the municipal courts of the Allied and Associated Powers.[1]

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[1] Cf. Art. 7 of the British-Italian Agreement relating to Italian Property held by the Custodians of the United Kingdom of 17 April 1947, which provides that 'the Italian Government will indemnify the Government of the United Kingdom against *claims by former owners* where it is established that the property was wrongly vested in the Custodians . . .'.

THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION

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ARTICLE 13 (1) (*a*) of the Charter of the United Nations requires the General Assembly to initiate studies and make recommendations for the purpose, *inter alia*, of encouraging the progressive development of international law and its codification.[1] There is nothing novel in this proposal. The movement for the codification of international law and its development by general law-making treaties has a continuous history extending over rather more than a century, so that there is a very rich fund of material and experience already to hand.[2] The time seems opportune, therefore, for re-examination and assessment of the possibilities and limitations of this important technique for the development of the law. Before examining the proposals made as a result of the energetic action already taken by the General Assembly of the United Nations under Article 13 (1) (*a*), it will be convenient to consider the meaning, scope, and technique of codification in general.

I. *The meaning and scope of codification*

There is a school of thought which holds that codification in the proper sense of the word can only mean the writing down of already existing rules of law; though it usually has to be conceded that in practice even a strict codification in this sense may also involve the making of a few minor changes in the law.[3] It is difficult to find any convincing reason or authority for thus artificially restricting the meaning of the term, either in the experience of municipal or international law, beyond the perhaps natural preoccupation of the common lawyer with the English consolidating statutes. The word 'codification' in its ordinary meaning certainly indicates a written form of law; but it equally clearly has no necessary implications concerning the materials to be used in making the code.[1] Most of the great historical codes have included legislation. In any case it is certain that codification in this very strict sense, however useful it may be in consolidating the already developed rules of a mature system, can have little place in a comparatively undeveloped system like international law. When it has been attempted in the past it has almost invariably been found necessary both to make new law and to modify existing law;[2] for the whole purpose of codification of international law is to resolve differences and to fill in the gaps. To adopt too strict a definition of the process involved is therefore to defeat the very ends for which the machinery is to be employed.

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[1] For the history of this provision see Yuen-li Liang in *American Journal of International Law*, 42 (1948), pp. 66 ff.

[2] An admirable historical survey of the development of international law and its codification by international conferences was prepared by the Division of Development and Codification of International Law of the United Nations Secretariat and is reprinted in *American Journal of International Law*, 41 (1947), Suppl., at p. 29.

The chief landmarks are the following: Congresses of Vienna, 1815, and Aix-la-Chapelle, 1818, on diplomatic agents; Declaration of Paris, 1856; Brussels Conference on the rules of land warfare, 1874; Hague Peace Conferences, 1899 and 1907; Conferences on the unification of private international law, 1893–1928; International Postal Conferences, 1863–1939; Conferences on sanitary regulations, 1851–1938; Establishment of the International Telecommunications Union at Madrid in 1932; Conferences on air law at Paris in 1919 and Chicago in 1944; Warsaw Conference on law of carriage by air, 1929; Barcelona Conference on international waterways, 1921; the 1923 Commission on air warfare rules; London Naval Conference, 1909; Conferences on the protection of industrial property, 1880–1934; Conferences on the protection of literary property, 1884–1928; International Maritime Conferences, 1905–30; Hague Codification Conference, 1930; International Labour Conferences, 1919–.

[3] E.g. Mr. P. J. Noel-Baker writes in this *Year Book*, 5 (1924): 'Broadly the answer is that the word codification properly used means the writing down of existing law, and that the making of new law, either *in vacuo* or by the amendment or development of existing rules, ought

In this article, therefore, it is assumed that 'codification' means any systematic statement of the whole or part of the law in written form, and that it does not necessarily imply a process which leaves the main substance of the law unchanged, even though this may be true of some cases. In other words, codification properly conceived is itself a method for the progressive development of the law. It is not denied, of course, that the task of codifying an existing and consistent body of law is very different from the task of creating a code where the existing law is fragmentary and requires the devising of new rules to fill the gaps or resolve discrepancies or even

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to be termed legislation.' He continues: 'This need not involve an absolutely rigid adherence to the distinction made. Codification may involve minor changes in the existing law, and legislation may include the restatement of some parts of the existing law, but broadly the distinction is clear.'

[1] It is certain that Jeremy Bentham cannot have had any such restriction in mind when he introduced the term in English legal terminology, for the code of international law which he proposed was almost entirely the child of his own imagination, and bore little or no relationship to existing international law, the existence of which, indeed, he was at some pains to deny. See his *Principles of International Law* (1843).

[2] A striking example is the London Naval Conference of 1908–9. The Conference began on the assumption that its task was simply to write down the existing law. The British Government informed the Powers that the main task of the Conference would not be 'to deliberate *de lege ferenda*' but to 'crystallize, in the shape of a few simple propositions, the questions on which it seems possible to lay down a guiding principle generally accepted'. The resulting Declaration of London itself stated that 'The Signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law'. Yet Art. 65 provided that the Declaration must be accepted as a whole or not at all, the reason being that it did in fact represent a compromise between different points of view about existing law. Moreover, when the British and French Governments announced on 7 July 1916 that they would no longer apply the Declaration, the announcement was made in order that they might revert to the rules of customary international law!

See also the comment of the Belgian delegate at the Hague Codification Conference of 1930: 'In reality, our examination of the questions led us to believe—and the decisions in the Committees convinced us of the truth of this—that, while it is perfectly right in theory to distinguish between pure codification and the adoption of new rules, nevertheless, in practice we could not maintain this distinction in any of our Committees.'

where the draftsman starts with a *tabula rasa*. But the essential differences between the processes involved depend not upon the object in view but on the differences in the materials available for the task. The end in view—a systematic statement of the law—is the same in either case. A man who sets himself to build a house may start from the ground or he may start with an existing building which is to be modified to suit his requirements: but the finished article is in either case properly called a house. It may be objected that this is merely a question of words. As Lord Macnaghten once said, most questions are; but it is nevertheless important. Preoccupation with the mere restatement of existing law has often concentrated attention, especially in this country, on what experience has shown to be in many ways the more difficult task, thus producing a school of pessimists who conclude that codification being so restricted is both undesirable and unnecessary.

Codification and the sources of International Law. Whatever the meaning attached to the word 'codification', it is in any case an activity which is intimately concerned with the sources of the law. The essential feature of the process is the employment of the written source. International law in its present state recognizes two such written sources: the first and the more important is the law-making treaty; secondly, there are written sources such as works of authority which, in the words of Article 38 of the Statute of the International Court of Justice, are to be used as subsidiary means for the ascertainment of the law. It is obvious that 'source' is here being used in two different senses. The treaty is a primary source in the sense that the treaty is not only the evidence of the law but also the source of its validity. On the other hand, written evidences not in treaty form are mere evidences; for the source of the validity of the law in this case is custom.[1] Both these forms of written source are employed in codification, and it is important to bear the distinction between them always in mind, for whereas the employment of the first implies a change in the source from whence the law derives its validity, the employment of the second does not—a vital distinction, as will shortly appear. Let us therefore consider each of them in turn as a possible vehicle of codification.

The treaty as a vehicle of codification. It is a fundamental principle of treaty law that *pacta tertiis nec nocent nec prosunt*; a treaty, being based on agreement, cannot affect the law which applies to states which do not become parties to it. It is true that within very limited areas there may be the beginnings of exceptions to that rule,[2] but the exceptions are relatively unimportant and must not be allowed to obscure the basic fact that there is no process of true legislation available to the codifier of international law: that is to say, there is no authoritative body which can lay down general norms not sanctioned by the common agreement of states. To admit any real analogy between such a process and the conclusion of general law-making treaties is, indeed, to ignore the main factor which is responsible for the intractability of the codification problem in international law. The all too common use of the term 'international legislation' in connexion with general treaties is therefore to be deplored; for not only does it give an altogether misleading impression of the condition of the international society, but it further tends to propagate a dangerous complacency by obscuring one of the most obstinate of the difficulties with which the international lawyer has to contend. The truth of the matter is that the general law-making treaties differ from particular treaties only in degree and not in kind. Even the general treaty is law only for the parties to it. Moreover, this necessity for agreement not only affects the area of validity of the instrument; it may also vitiate its substance, for the desire to secure general acceptance may result in purposely ambiguous drafting so that the treaty may do little more than record a decently concealed agreement to differ. The temptation to draft in this way in order to give an appearance of success to an international conference which has been called with all the paraphernalia of modern publicity is very great, and politically may even be justified; but it is obvious that if international law is to be 'codified' in this way, its last state will be worse than the first. This does not at all mean, however, that we need despair of codification or development of the law by means of the multilateral treaty; but it does mean that the effect of the *pacta tertiis* rule needs very careful study in relation to the varying kinds of material that form the subject-matter of the codifier's art.

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[1] Briggs, *The Law of Nations: Cases, Documents and Notes* (1938), at p. 45, has a useful nomenclature indicating this distinction. The first he calls a 'method of formal enactment' and the second an 'evidence'.

[2] See Hudson, *International Legislation*, vol. i (1931), Introduction, at p. xvii.

In particular, the *pacta tertiis* rule raises nice problems in relation to the so-called *declaratory* treaties which purport merely to restate existing rules of customary international law; to the kind of treaty, in fact, to which the narrow or pessimistic school would confine the art of codification. Now it is evident that a declaratory treaty does not in form differ from any other kind of treaty. It is binding only on the parties to it. If it is in fact declaratory of existing customary law, third states not parties to the treaty will, of course, be bound by identical rules derived not from the treaty but from customary law. But in practice the position can never be quite as simple as that. The evidences of customary law are notoriously difficult to handle. There is often room for considerable differences of opinion as to what the customary rule is; this in fact being the only warrant for its attempted restatement in treaty form. After being reduced to written form the rule is almost bound to take on a rather different colour. The change of source from custom to treaty may seem to be purely formal and adjectival, but it has inevitable repercussions on the substance.

In the first place, it must be remembered that the change in formal source of the law from custom to treaty also changes the technique by which the content of the law is to be ascertained. There is a well-established body of rules governing the interpretation of treaties, which rules do not apply so long as the source of the law is custom. The application of these rules of interpretation may and probably will change the content of the substantive rules which have been codified. At any rate it can be said with assurance that the mere change of form from custom to treaty, quite apart from the subtle changes of emphasis almost inevitably associated with the actual drafting of the rules, will change the direction of the future development of the law. Moreover, these rules of interpretation affect not only what is said in the treaty but may also affect what is left out. Thus, for example, at the Hague Codification Conference of 1930 some states expressed concern over the possibility of the application of the maxim *expressio unius exclusio alterius* to a partial codification, in order to make a colourable case against a long-established rule of customary law on the ground that it was not expressly stated in the convention. Such an argument may not be easy to counter when it is remembered how indecisive the evidences of customary law can be.

Secondly, it must not be forgotten that, from the point of view of durability and permanence, to restate customary law in treaty form may be to adopt the weaker vehicle in place of the stronger. Treaties are notoriously friable. The ways in which treaty obligations may terminate are amorphous and controversial. The existence of such doctrines as that of the *clausula rebus sic stantibus* is a constant encouragement to the pettifogger. Moreover, the need for flexibility in the law seems actually to require that codification conventions should be made easy of modification, for to omit this precaution may be to stultify the natural growth of the law. A state therefore may well be apprehensive that the embodiment of a customary rule in a convention will actually weaken rather than strengthen its authority. The dilemma was pointed out by the Preparatory Committee of the 1930 Conference:

> 'A particular Government which is prepared to sign some provision or other as a conventional rule might possibly refuse to recognise it as being the expression of existing law, whereas another Government which recognises this provision as existing law may not desire to see it included in a convention, being apprehensive that the authority of the provision will be weakened thereby.'

All these considerations dictate one conclusion: as long as there is no means of true legislation in international law, and as long as the highest order of international instrument available for the purpose is the treaty, even a code which is strictly confined to an attempt to restate the existing law in written form can only be made entirely without prejudice to the question of whether the rules so stated do or do not form part of customary international law.[1] The codifying treaty does not replace existing customary law but is necessarily superimposed upon it. It is not a simplification of the law but an entirely additional complication. This does not necessarily mean that nothing is achieved, but it does mean that very much less may be achieved than at first sight appears.

This is, of course, a difficulty peculiar to a society which has no machinery for general legislation. For legislation is of the very essence of codification in its strictest sense. Its function is not merely positive but also negative. The whole point of traditional codification is not only to create a new source of the law but also to sweep away the old. Its aim is simplification and the achievement of clarity, and without the possibility of sweeping away the old sources which it is designed to replace, the supposed codification is stultified in its main purpose. The fact that such a process of substitution of treaty for custom is hardly possible in international law should give pause to those who too easily advocate an attempt to restate existing customary law in treaty form.

It would seem, therefore, that any attempt simply to restate existing customary law in the form of multipartite treaties is misconceived. The true sphere of the multipartite treaty is the making of new law, which may or may not in fact be based on the existing customary law. If, as we have seen, the treaty must inevitably be made without prejudice to the existing law, it follows that the attempt to secure agreement on what the existing law is, is no longer a necessary preliminary step. General appreciation of this fact would, it is submitted, greatly simplify the task of drafting general law-making treaties of this kind. From the point of view of the draftsman, the existing customary law then falls into its proper place as valuable raw material for the construction of his edifice; but he need not regard his draft as being necessarily a statement of what the law is, but can and should regard it as a statement of what the law ought to be. It is, of course, important to establish what the differing points of view are; but that is no more than to say that the draftsman must study his materials. It does not at all follow that it is essential to secure agreement on what the law is before agreement can be achieved on what the law ought to be. The contrary assumption, that agreement on what the law is is a necessary preliminary to the drafting of a code, is the result of the unfortunate and quite unwarranted restriction of the meaning of the term to which reference has already been made. A code in this narrow sense, like the English consolidating statute of the nineteenth century, is possible in a system of law where there is a legislature and also where the existing law is mature and definite; but this kind of code is in every way irrelevant to the present state of international society, at any rate so far as codification by treaty is concerned.

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[1] As was recognized by the Hague Conference of 1930 when there was included in Art. 18 of the Convention on certain Questions relating to the Conflict of Nationality Laws the following clause: 'The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.'

The assumption that a codifying treaty must be built only from agreed existing materials of customary law, and that the draftsman may not select, reject, reshape, or innovate, has been responsible for many of the disappointments of the past.[1] Experience has shown over and over again that where the work has not been overshadowed by the baneful influences of a misunderstanding of the rubric of codification, a more or less satisfactory code may be achieved. The Chicago Civil Aviation Conference of 1944 was not called a codification conference, nor is the word code mentioned in any one of the ninety-six articles of the resulting Convention; yet can it be doubted that this Treaty, which provides a single set of rules covering every aspect of aviation law and replacing the two great regional systems which had hitherto divided the world between them, is any the less a code of international law in every proper sense of the word? To take another example, it has already been pointed out by Professor Brierly that the one modest achievement of the Hague Codification Conference of 1930 was in the Convention and Protocols dealing with nationality, where the Conference broke through the taboos and frankly made new law. The Declaration of Paris of 1856, which Sir William Malkin said was 'the first and remains the most important international instrument regulating the rights of belligerents and neutrals at sea which has received something like universal acceptance',[2] was a statement of what the law ought to be, made necessary and possible by the very fact that it was impossible to secure agreement on what the existing customary law was.

The restatement technique in codification. Sir Cecil Hurst has made an eloquent plea for what he calls the codification of international law on new lines, viz. a scientific restatement of the law, rather after the fashion of the highly successful Restatements of American municipal law.[3] There is, of course, no reason in pure theory why such a scientific restatement should not be made in the form of a multipartite treaty; in fact that is what the so-called declaratory treaty purports to be. We have already discussed the objections which undoubtedly exist to the declaratory treaty in practice, however attractive it may appear to be in theory. These objections, however, are largely avoided if the restatement is made not in the form of a multipartite treaty but in the form of an authoritative, written evidence of the existing customary law. The difficulty of the change of the formal source of validity involved in the conclusion of a treaty is avoided, and all the difficulties which that implies. The restatement then ranks merely as one of the evidences of the customary law, and the degree of authority it bears will depend upon its quality. Such work, of course, can be carried out on national as well as international lines; it may also be the work of amateur as well as of official bodies. The great possibilities of this method of approach have already been strikingly demonstrated by the *Harvard Research*, surely one of the major contributions of recent times to the science of international law. This was, of course, a purely American venture, but there is no doubt that a similar work produced under international auspices might, if of sufficient calibre, soon win for itself a very considerable authority. By Article 38 of its Statute, the International Court of Justice is required, as a subsidiary means for the ascertainment of the law, to consult the writings of the most eminent publicists; and, indeed, authoritative writings have always been recognized evidences of international law. A carefully compiled restatement of the law by an international body of jurists working under the auspices of the United Nations might well win for itself a special position in the ranks of such evidences of the law. Moreover, it is reasonable to suppose that agreement on what the law is is much more likely to be forthcoming from a committee of jurists with a scientific approach than from a conference of governmental delegates whose outlook is necessarily coloured by national interest. It would appear, therefore, that where the aim is restricted to a codification of existing law, the restatement technique has much to commend it and, in this aspect of codification, may well be superior to the multipartite treaty.

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[1] The Swiss Government's official comment on the results of the Hague Codification Conference of 1930 went so far as to say that: 'The experience gained at the Hague has, moreover, shown clearly that, if a conference were empowered—supposing this to be possible—to state the existing rules of international law, the results might be disastrous.'

[2] In this *Year Book*, 8 (1927).

[3] 'A Plea for the Codification of International Law on New Lines', a paper read before the Grotius Society, 16 October 1946. The restatement method was also pressed by M. Basdevant and others at the Lausaune meeting of the Institute of International Law in August 1947: see summary in *Friedens-Warte*, 1947, p. 292. It was also advocated strongly by the United States member of the General Assembly's Codification Committee, the report of which is discussed below.

It would be a mistake, however, to think even of the restatement technique as being entirely without influence on the actual development of the law as distinguished from the mere restatement of existing principles. The training of the common lawyer, with its emphasis on case law, tends towards an altogether too restricted view of the role of the jurist as a mere expert witness of what the law is.[1] But a little reflection will show that this is too narrow and pedantic a view of the role of the commentator. In practice it is not always possible to differentiate sharply between the task of saying what the law is and the task of saying what it ought to be. Any living system of law has an inherent and peculiar logic which dictates constant change. Expert reclassification and analysis of existing materials is therefore a method by which the law is developed in any system; it is indeed the method by which English courts develop and constantly modify the common law. Yet it cannot be said that they are doing other than declare what the law actually is. It is not suggested that jurists can *make* law; but there certainly is a sense in which it may properly be said that jurists may discover new law which has hitherto been latent but unacknowledged in the existing and accepted principles. As Lord Sankey said in the case of *In re Piracy Jure Gentium*,[1] 'in estimating the value of opinion it is permissible not only to seek a consensus of views but to select what appear to be the better views upon the question'. 'Better' here does not mean better from an ethical standpoint, but better law. Similarly, a committee of jurists charged with a restatement of a part of existing international law may select those views which are better law. The restatement technique must not therefore be thought of as a mere routine proceeding of collecting materials. Proper analysis and deployment of those materials may well contribute in no small measure to the actual development of the law.

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[1] Characteristic is the well-known passage in the judgment of Lord Alverstone C.J. in *West Rand Central Gold Mining Co., Ld.* v. *The King*, [1905] 2 K.B. 391, at p. 402: 'The views expressed

The usefulness of the restatement method must not, however, be exaggerated. The great need to-day is for the development of law to cover new fields where there is little or no existing material. It does not require great perception to see that a mere restatement of existing law, however elegantly and liberally accomplished, would be ludicrously inadequate to meet the needs of contemporary international society, and it would be tragic if the comparative ease with which this process could be set in motion were to blind us to the need for something much more radical in the way of law-making. Radical law-making can only be done in time by the vehicle of the multipartite treaty, and that is where the major effort should be concentrated.

The conclusions to be drawn from this brief survey of the available methods of codification seem therefore to be as follows. There are two vehicles of codification available: first, the multipartite treaty; and, secondly, the restatement not embodied in treaty form. The multipartite treaty is properly employed as a law-making process for the conscious,

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by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent communities, "law".'

[1] L.R. [1934] A.C. 586, 589.

active, development of the law. It is the nearest we can get to true legislation, and legislation is an important part of the work of codification. The multipartite treaty is of doubtful utility where the aim is merely to declare or consolidate existing customary law.[1] On the other hand, for this latter aspect of codification a very suitable vehicle may be found in the scientific restatement, conceived as an authoritative, written, evidence of existing customary law.

II. *The International Law Commission*[2]

We can now turn to proposals made by the General Assembly's Committee for the giving effect to Article 13 (1) (*a*) of the Charter. On 11 December 1946 the General Assembly appointed a Committee on the Progressive Development of International Law and its Codification (which we shall refer to hereafter as the Codification Committee), consisting of the representatives of seventeen states, charged with the task of inquiring into the methods by which Article 13 (1) (*a*) of the Charter might best be implemented.[3] The resolution directed the Committee to study:

> '(*a*) The methods by which the General Assembly should encourage the progressive development of international law and its eventual codification;
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> '(*b*) Methods of securing the co-operation of the several organs of the United Nations to this end;
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> '(*c*) Methods of enlisting the assistance of such national or international bodies as might aid in the attainment of this objective.'[4]

After holding some thirty meetings the Committee was able to present its very important Report on 17 June 1947.[5]

Much the most important part of the recommendations of the Committee is that effect could best be given to Article 13 (1) (*a*) of the Charter by the 'establishment of a single Commission composed of persons of recognized competence in international law to be called the International Law Commission (I.L.C.)'. It is interesting to note that a similar conclusion had already been reached by the Inter-American Juridical Committee, which was set up by a meeting of Foreign Ministers at Rio de Janeiro in 1942 to overhaul the machinery for codification in the Pan-American Organization, an organization which has had a continuous and by no means unsuccessful experience of the work of codification extending as far back as the Mexico Conference of 1901–2.[1]

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[1] There would be no difficulty, of course, in consolidating by treaty existing *conventional* law, provided all the necessary parties can be brought in.

[2] The Statute of the International Law Commission became available after this section had been sent to the printer. The text therefore refers not to the Statute but to the Report of the General Assembly's Committee on which the Statute is based and which, in the main, it faithfully follows. Fortunately, it has been possible to make all necessary references to the Statute itself by means of additional footnotes.

[3] Resolution No. 94 (i) of the First Assembly. The states represented on the Committee were: Argentina, Australia, Brazil, China, Colombia, Egypt, France, India, Netherlands, Panama, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States of America, Venezuela, and Yugoslavia.

[4] By later resolutions the Committee was further requested:

(i) 'To treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.'

(ii) 'To report to the General Assembly on a Draft Declaration on the Rights and Duties of States presented by Panama to the Second Part of the First Session of the General Assembly' (Doc. A/285).

[5] See Doc. A/AC.10/51 (Codification of International Law); Doc. A/AC.10/52 (Nuremberg Principles); Doc. A/AC.10/53 (Rights and Duties of States). All three documents are reprinted in *American Journal of International Law*, 41 (1947), Suppl., p. 18.

Certain members of the Codification Committee had taken the view that more than one commission was needed; and indeed separate commissions for public international law, private international law, and penal international law were at one stage suggested. It was even suggested that there might be one commission for the development of international law and another for its codification. However, it was finally agreed that although different procedures might be required for different tasks, the responsibility for the whole work should be undertaken by a single commission.

It was also agreed by a majority decision that the Commission should consist of fifteen members, a number that borders dangerously on the unwieldy.[2] The Committee by a majority recommended a procedure for the election of members of the Commission based on the procedure already employed so successfully in the election of Judges of the International Court of Justice. It was also decided to recommend that the members of the Commission should give full-time service, and there was general agreement that they should receive a salary 'proportionate to the dignity and importance of their office'. It was hoped that the Commission might become a permanent body, but it was recommended that the members be elected in the first instance for an experimental period of three years. The seat of the Commission was to be at Lake Success, but it might decide from time to time to hold its sessions at other places.[3]

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[1] The report of the Inter-American Juridical Committee is published in *American Journal of International Law*, 39 (1945), Supplement. It states, *inter alia*:

'That the Juridical Committee is convinced that the work of codification can only be successfully prosecuted if a central organization of a permanent character is established, which can devote its whole time to the work of codification and can bring unity into the activities of the various agencies employed in the work.

'The principal work of codification should be entrusted to a small committee of technical experts, herein described as the Inter-American Codification Committee, which could act as a central agency for the coordination of the work of the various public and private bodies directly or indirectly engaged in the work of codification.'

[2] The United Kingdom proposed seven members, the United States nine. The number of fifteen was finally agreed by a vote of nine to five.

[3] The Report of the Committee was referred by the General Assembly to its Sixth Committee, which in turn referred it to a sub-committee. From these deliberations there emerged a draft Statute for an International Law Commission, which Statute was adopted by the Second Session

Procedures for 'progressive development' and 'codification'. In the first place it is encouraging to note that the Committee refused to make any clear-cut distinction between codification and progressive development, and carefully avoided committing itself to any narrow definition of codification as a term of art. It is true that in its recommendations on procedure the Committee draws a distinction between two processes which, 'for convenience of reference', were to be denoted by 'progressive development' and 'codification'. By 'progressive development' they mean 'the drafting of a convention on a subject which has not yet been highly developed or formulated in the practice of states': by 'codification' they mean 'the more precise formulation and systematization of the law in areas where there has been extensive state practice, precedent and doctrine'. But the Committee makes it quite clear that the terms are not to be regarded as mutually exclusive.

> 'For the codification of international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice. It was pointed out that in any work of codification, the codifier inevitably has to fill in gaps in and amend the law in the light of new developments. The Committee by a majority vote, however, agreed that for the purposes of the procedures adopted below, the definition given in paragraph 7 above would be applicable.'

Thus the Committee recommends two alternative procedures, the one for 'progressive development' and the other for 'codification'. These procedures, both of which employ the familiar questionnaire technique,[1] must now be discussed *seriatim*.

If a project for *progressive development* is referred by the General Assembly to the Commission, the Commission then proceeds as follows. It first appoints a Rapporteur, and it was recommended by a majority decision of eight votes to seven that the Commission should be free to go outside its own membership in its choice of a Rapporteur, the reason presumably being that the subject may well be one on which none of the

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of the General Assembly (by forty votes to nine, with six abstentions) on 21 November 1947. (The Statute is printed in *American Journal of International Law*, 42 (1948), Suppl., p. 1). The I.L.C. is thus formally in being; although the election of members was deferred to the Third General Assembly, the Secretary-General was instructed to undertake preparatory work in the meantime.

The Statute substantially follows the recommendations of the Committee for the organization of the I.L.C. There were, however, two important changes. The Statute rejects the Committee's scheme for the election of members and provides that they shall be elected by the General Assembly from lists of candidates nominated by Governments Members of the United Nations (Arts. 2 to 11). Further, the Statute does not require members of the Commission to give full-time service.

[1] Employed not only in the preparations for the Hague Codification Conference of 1930, but also, for example, by the Universal Postal Congresses, the Conferences for the Unification of Private International Law, and in a modified form by the International Labour Organization.

members of the Commission have the required special knowledge.[1] The Commission and the Rapporteur then formulate a plan of work and, this done, the next step is to circulate a questionnaire to the Governments, asking them to supply the relevant information and data within such time as the reference from the General Assembly may demand. Meanwhile the Commission is to appoint a small sub-committee to work with the Rapporteur on interim drafts pending the receipt of replies from the Governments. The drafts will be periodically considered by the whole Commission, and it was also recommended that the Commission be authorized to consult with scientific institutions and, if necessary, with individual experts.[2] When the drafts are considered to be in satisfactory form, they are then to be issued as a Commission document, together with appropriate explanations and supporting material, and the replies of the Governments to the questionnaire, the whole to be given 'the widest possible publicity'. Thus, unlike the method used at the Hague Codification Conference of 1930, the material supplied by the replies of the Governments is to be used to produce, not bases of discussion, but actual draft articles. At this stage the Governments are again to be asked to submit, within a reasonable time, any comments on the Commission document. The draft and any further governmental comments are then reconsidered by the Rapporteur and his sub-committee, who prepare a final draft and explanatory report, which is then considered by the whole Commission and, if adopted, is then submitted through the Secretary-General to the General Assembly. Nothing is said of the procedure then to be adopted by the General Assembly.

The procedure outlined above assumes that the initiative in a project for progressive development will normally come from the General Assembly. Certain members of the Committee, indeed, were of opinion that the procedure should actually be limited to projects referred to the Commission by the General Assembly; no doubt a suggestion dictated by the feeling, very prominent in the post-mortem discussions on the Hague Codification Conference of 1930, that it is unwise to proceed with any project that does not have the approval of the political representatives of Governments at the outset. However, more liberal counsels prevailed by majority decisions, and the Committee was able to recommend that the I.L.C. be also authorized to consider 'projects and draft conventions recommended by governments, other United Nations organs, specialized agencies, and those official bodies established by inter-governmental agreement to further the progressive development of international law and its codification, transmitted to it through the Secretary-General'. In these cases a procedure similar to the above is laid down, except that comments are first to be invited from Governments and such organs of the United Nations or specialized agencies or official bodies as are concerned, and a report then immediately made to the General Assembly, and only if the General Assembly should then invite the Commission to continue working on the project will the rest of the procedure be put into operation.[1] This seems to meet the gravamen of the objections without actually closing the door to projects coming from sources other than the General Assembly and its various committees.[2]

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[1] The Statute, however, follows the opinion of the minority and provides that 'The Commission shall appoint one of its members to be Rapporteur' (Art. 16 (*a*)).

[2] Who, according to the Statute, 'need not necessarily be nationals of Members of the United Nations' (Art. 16 (*e*)).

A somewhat different procedure is recommended for the process of *codification.* The General Assembly is invited to recommend that the I.L.C. 'survey the whole field of customary international law, together with any relevant treaties, with a view to selecting topics for codification, having in mind previous governmental and non-governmental projects'.[3] Thus, the initiative for this kind of work may come either directly from the General Assembly or from the I.L.C. itself as a result of its general study required by the overall survey asked for by the Assembly. To this extent, therefore, the initiative may come from the I.L.C. after a study of the topic in question. This at any rate does give the I.L.C. power to initiate the kind of general survey and study which experience shows to be desirable before the machinery is finally committed to the project.[4] Moreover, since the Committee's Report itself admits, as we have seen, that no clear-cut distinction is possible between codification and progressive development, the brief is a wide one. If by this means a particular project is chosen for codification, a machinery of Rapporteur, sub-committee, and questionnaire, similar to the one suggested for progressive development, is set in motion. The work is finally to be embodied in a report containing draft articles of multipartite conventions, the draft of each article to be followed by:

> '(i) Complete presentation of all precedents and other relevant data including treaties, views of leading publicists, etc.
>
> '(ii) Conclusions relevant to:
>
> (1) The measure of agreement in the practice of states and in doctrine on each point involved;
>
> (2) The areas of divergence or disagreement in practice and doctrine.

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[1] This procedure is not unlike that laid down by the League of Nations for the initiation of draft conventions by subsidiary organs of the League, where there was likewise a vetting of the suitability of the project by the Assembly immediately after the first draft was prepared (Doc. 83, 1930).

[2] These recommendations are adopted in Art. 17 of the Statute.

[3] This recommendation is carried into effect by Art. 18 (1) of the Statute: 'The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not.'

[4] However, a request from the General Assembly for the investigation of any subject is to be given precedence (Art. 18 (3) of the Statute).

'(iii) The arguments which have been advanced in favour of one or other solution, in cases where divergence or disagreement exist.'[1]

The comments of the Governments on the Report having again been invited, and the Report reconsidered by the Rapporteur and his sub-committee and finally by the whole Commission, the Report is then to be submitted through the Secretary-General to the General Assembly. It will be remembered that the procedure for progressive development stops short at this point. Not so the procedure for codification, which goes on to provide that the Report shall be accompanied by the I.L.C.'s recommendations, which may be either:

'(*a*) that no further action be taken in view of the fact that the report has already been published, or
'(*b*) that the General Assembly should adopt all or part of the report by resolution, or
'(*c*) that the General Assembly should recommend the draft to States for the conclusion of a convention, or
'(*d*) that the General Assembly should convoke a special conference to consider the conclusion of a convention.'[2]

These alternative recommendations are interesting, and plainly reflect a compromise between those who favour a restatement technique for codification and those who advocate the employment of the multipartite treaty in every case. The virtues of the restatement method for codification were strongly pressed by the United States member,[3] and the final Report of the Committee goes some way towards meeting this point of view by recommending that, although the conclusions of the I.L.C. on any particular topic for codification should be in the form of draft articles for multipartite conventions, the results of the studies might, as an alternative to embodiment in conventions to be submitted to states for ratification or adoption by the General Assembly, be allowed simply to remain in the form of a published volume to have whatever influence its quality warrants.

Recommendation (*b*), that the General Assembly might adopt all or part of the Report by resolution, is not free from difficulty, for it is not entirely clear what precisely is intended to be the result of the 'adoption' of the Report by the General Assembly. Presumably it was intended to provide a method by which the authority of the General Assembly could be attached to a Report, thus making it in effect a highly authoritative restatement of the law to be resorted to by the courts. Instead of leaving it, as in alternative (*a*), for whatever it is worth, this procedure does, as it were, go to the length of saying what it is worth. Such an adoptive resolution of the Assembly would be made, in accordance with Article 18 of the Charter, by a simple majority of the members present and voting, unless it were decided to be a matter of 'importance' requiring the two-thirds majority. It is evident that where the Report of the I.L.C. is strictly a codification of the existing law and does not contain serious modifications, it might be advisable to use this method, which has the advantage of immediately conferring upon it the qualities of a highly authoritative document, rather than to risk remitting it to the limbo of unratified conventions.

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[1] See Art. 20 of the Statute:
'(*a*) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;
(*b*) Conclusions relevant to:
  1. The extent of agreement on each point in the practice of States and in doctrine;
  2. Divergencies and disagreements which exist, as well as arguments invoked in favour of one or other solution.'

[2] See Art. 23 of the Statute:
'(*a*) To take no action, the report having already been published;
(*b*) To take note of or adopt the report by resolution;
(*c*) To recommend the draft to Members with a view to the conclusion of a convention;
(*d*) To convoke a Conference to conclude a convention.'

[3] See *Department of State Bulletin*, vol. xvii, no. 420, p. 124.

It is, of course, tempting to push the meaning of 'adoption' still further and draw an analogy between adoption of the Report by the General Assembly and adoption of draft international labour conventions by the International Labour Conference in accordance with Article 19 of its Constitution. Having been adopted by the Conference, these labour conventions are then open for ratification by states; a method which provides a rationalized procedure 'as a means of fixing the form of, and giving legal existence to, conventions submitted to States with a view to ratification'.[1] However, tempting as the analogy is, it must be observed that the Committee's recommendation speaks not of the adoption of a draft convention but of the adoption of the I.L.C.'s Report, and it seems, therefore, reasonably clear that it was not intended to confer upon the General Assembly powers of adopting draft conventions comparable with those of the International Labour Conference.

The distinction between recommendations (*c*) and (*d*), both of which contemplate the conclusion of multilateral conventions, appears to be that, whereas under (*d*) the General Assembly would itself become responsible for calling and organizing the necessary conference, under the mere 'recommendation' to be made under alternative (*c*) the initiative and responsibility for the conference would be left to the Governments. It seems probable that this alternative (*c*) was provided in order that the existing machinery may be continued in those matters which traditionally have been organized by particular Governments: for example, the Netherlands Government has always been responsible for conferences on matters of private international law, the Belgian Government for maritime conferences, the British for the safety of life at sea, and so on.

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[1] See Jenks, 'Some Constitutional Problems of International Organizations', in this *Year Book*, 22 (1945), p. 47. The Hague Codification Conference procedure also provided for the 'adoption' of draft conventions by a majority vote in the Conference; but here 'adoption' was followed by the normal procedure of signature by plenipotentiaries.

Such, then, are the two alternative procedures offered by the Codification Committee's Report. There can be little doubt that they provide a sound and flexible drafting machinery in both parts. A disquieting feature of this part of the Report, however, is that it seems to be assumed that a given topic can at the outset be labelled as being either a project for 'progressive development' or a project for 'codification', and so committed to the one or the other of the two procedures. This is disturbingly reminiscent of the forms of action at common law. It is, of course, true that different procedures are appropriate to these two different processes, and that the question of which of the two procedures is appropriate is one which depends almost entirely on the nature of the subject-matter. Nevertheless, it seems sufficiently apparent from the experience of the past, and in particular from the experience of the 1930 Hague experiment, that the answer to the question which of the two processes is appropriate to any given topic may not become apparent until after the topic has been subjected to very considerable study and analysis, and probably in most cases not until the replies have been received from the Governments to the first questionnaire. It is very much to be hoped, therefore, that the two procedures will not be thought of as being either entirely separate or as being mutually exclusive. It is most important that it should be made possible easily to escape from the one procedure into the other, and that it should not be supposed that the choice of procedure can be finally made when the subject-matter is first chosen.

Co-operation with other organs of the United Nations. It will be remembered that the Codification Committee was specifically charged by the General Assembly to investigate the question of enlisting the co-operation of the several organs of the United Nations in the work of codification. The Committee recommended:[1]

(*a*) that the I.L.C. be authorized to consult with such organs;

(*b*) that in projects referred to it by an organ of the United Nations the I.L.C. should be authorized to make an interim report directly to the organ concerned before submitting its final report to the General Assembly. This sensible suggestion was carried only by a majority, some members apparently taking the view that the Charter precluded any organ other than the General Assembly from submitting a project to the I.L.C. Two of the minority, however, were prepared to concede this right at any rate to the Economic and Social Council;

(*c*) that all I.L.C. documents which are circulated to Governments should also be circulated to the various organs of the United Nations.

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[1] These recommendations are embodied with only minor modifications in Art. 25 and Art. 17, 2 (*c*) of the Statute.

Assistance of national and international bodies. The General Assembly brief to the Codification Committee also required it to investigate the methods of enlisting the assistance of such national or international bodies as might aid in the attainment of codification.[1] The Committee recommended that

(*a*) the I.L.C. should be authorized to consult such bodies, official or unofficial;

(*b*) that, for the purpose of distribution of I.L.C. documents, the Secretary-General, after consultation with the I.L.C., should draw up a list of national and international organizations dealing with questions of international law.

A minority of the Committee wished to restrict consultation to those bodies appearing on the Secretary-General's distribution list; a restriction the purpose of which is by no means clear. It was added that in drawing up the list the Secretary-General should take into account the resolutions of the General Assembly and of the Economic and Social Council concerning relations with Franco Spain, and that organizations which collaborated with the Nazis and Fascists should be excluded both from consultation and from the list, a recommendation which can only be considered as an unfortunate and gratuitous interposition of politics into an activity which should be kept as far as possible on a strictly scientific and objective basis.

The Committee further recommended that the I.L.C. should be free to consult with scientific and professional institutions, and also (this by a majority) to consult, if need be, with individual experts. By a majority, the Committee decided to refer specifically to the desirability of consultation with the Pan-American Union, without, however, disregarding the claims of other systems of law. Three members of the Committee opposed this singling out of the Pan-American Union as being a violation of the 'principle of equality between States and systems of law'. Perhaps it was a little odd to single out the Pan-American Union for special mention, and certainly unnecessary. However, it is difficult to see what harm it could possibly do, and it is certainly true that the Pan-American Union has very great experience of the problem of codification. Incidentally, the idea of equality between systems of law is a new application of the troublesome doctrine of equality and might be disastrous to any attempted codification if it were pushed too far.[2]

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[1] The General Recommendations contained in the Final Act of the Hague Conference of 1930 (Doc. C. 228, M. 115, 1930 V) included the following: 'that subsequent conferences for the codification of international law should also have fresh scientific work at their disposal and that, with this object, international and national institutions should undertake at a sufficiently early date the study of the fundamental questions of international law, particularly the principles and rules and their application, with reference to the points which are placed on the agenda of such conference.'

[2] All the recommendations under this heading are adopted without substantial alteration in Art. 26 of the Statute.

III. *The technique of codification*

The procedures recommended by the Committee certainly provide admirable machinery for drafting; and, indeed, a body like the I.L.C., with its Rapporteur and sub-committee, could not well undertake more than the purely legal work of drafting. However, the experience of the past quite clearly shows that, more particularly in relation to the process which the Committee calls the progressive development of the law, the mere production of drafts by lawyers, no matter how expert, is not enough. Except in the case of the plain restatement of the law, codification is concerned with the art of law-making; and law-making involves extra-legal considerations on a very considerable scale.

All laws are concerned with the regulation of differing and often conflicting interests. Most rules of law represent a working compromise between conflicting interests. This fact is particularly apparent in international law, the more difficult or unsatisfactory branches of which are simply those parts of the law where the conflict of interests has been only partially resolved. For example, the bitter cleavage which quickly appeared in the 1930 Hague Conference Committee dealing with the Responsibility of States was not caused merely by academic disagreements on points of doctrine; a glance at the list of states ranging themselves on either side is enough to show that it was a cleavage between potential plaintiff states on the one hand and potential defendant states on the other. Differences of this kind are not likely to yield before a purely doctrinal attack. If success in developing law by this method is to be achieved, those national interests which lie behind the differing points of view on doctrine must be discovered and analysed, and the necessary conclusions drawn as to whether they can be resolved by compromise, or whether a new set of rules can be evolved which will comprehend all the interests, or whether it may be necessary to wait until a change in the political climate will make possible the modification of some of the interests involved.

Now this study of what, for want of a better term, we may call the sociological jurisprudence of international law has been gravely neglected. Yet it is a vital prerequisite for the development of the law in those parts of it which really matter. The three volumes of the Hague Bases of Discussion,[1] though not specifically designed to meet this need, do nevertheless demonstrate beyond a peradventure that the purely legal technical approach is not an adequate preparation for an attempt at law-making.

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[1] Vol. i, *Nationality*, C. 73, M. 38, 1929 V; vol. ii, *Territorial Waters*, C. 74, M. 39, 1929 V; vol. iii, *Responsibility of States for Damage caused in their territory to the person or property of Foreigners*, C. 75, M. 69, 1929 V.

The Governments had been requested to supply the necessary information under three heads: '(*a*) The state of their positive law, internal and international, with, as far as possible, full details as to bibliography and jurisprudence; (*b*) Information derived from the practice at home and abroad; (*c*) Their views as regards possible additions to the rules in force and the manner of making good existing deficiencies in international law' (Doc. C. 44, M. 21, 1928 V).

For example, it is well known that the work of the Second Hague Committee on Territorial Waters broke down as a result of its complete failure to agree upon the preliminary point of the width of the marginal belt. The governmental replies to that part of the questionnaire which dealt with the question shed a great deal of light on the reasons for that failure. They show, of course, an astonishing diversity of views, ranging from three miles to eighteen or more; but an examination of the reasons given in the replies shows that it was not simply a case of some states making more extravagant claims than others. The different widths claimed or suggested correspond to the many different national interests involved in the question of the régime of territorial waters, and each state assumed as the salient criterion that interest which was peculiarly appropriate to its own strategical, economic, political, or geographical position. Thus, the Norwegian reply consisted almost entirely in a factual statement of the geographical peculiarities of the Norwegian coast-line, its effect on the local fishing industry, and how a large and important part of its population depends for its very existence on the fishing industry.[1] Portugal, again thinking primarily of fishing rights, but in a very different context, considered six miles essential in order to be able to prohibit the use of 'enormously destructive modern fishing appliances', though she also considered that for custom and sanitary purposes eighteen miles would not be too much. On the other hand, the maritime Powers, led by Great Britain, emphasized the encroachment on the area of the free high seas which a marginal belt of more than three miles would entail, and the intolerable burden on neutrals in time of war. It will be appreciated that these are not different views on the one question; they are replies concerned with different questions. Furthermore, these are not legal arguments, and they cannot be met by a legal technique. It is evident that the advice required is not so much from lawyers as from economists and geographers.[2] No municipal Government would think of legislating on technical matters without seeking the help of appropriate technicians, and there seems no good reason why the same kind of assistance should not be enlisted in the field of international law. This is not the place to suggest a solution of the problem of the width of the maritime belt. It may be that some of these interests should be isolated and dealt with in separate solutions; it may be that some of the extra-legal arguments given in the governmental replies are unsound or are matters of comparatively little importance. It is sufficient for the purposes of this argument to show that this kind of information must be collected and studied by those competent to do so before it is practicable for the lawyers to draft a treaty which will comprehend and reconcile these very different points of view.

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[1] 'Thus, off the Norwegian coasts, the conformation of the sea bottom is quite different from that of the other coastal countries of the North Sea. In the latter case, the sea bottom slopes regularly and gradually from the coast out to sea, whereas along the Norwegian coasts it generally forms terraces with scarped and rocky slopes. On account of the natural geographical conditions, the Norwegian fisheries along the coasts are strictly local in character. The settlement of the population on the Norwegian coast has depended on the development of coastal fishing, which is the basic factor in determining the population in that part of the country. The inhabitants have for ages had the exclusive right of fishing on the coastal banks, and this right is deemed indispensable for the subsistence of the coastal population. Along most of the coasts of Norway, exposed as they are to inclement weather, the inhabitants have no resources at all other than the fisheries. Their very existence depends on them, since as a rule, agriculture alone cannot supply adequate means of subsistence.'

[2] That lawyers can be very blind to the political interests involved in rules of law is vividly illustrated by the fact that the Experts Committee of the League of Nations which chose the first

It is not necessary to labour further the need for scientific and objective study of the national interests implicit in and underlying the rules of international law. It is, indeed, the corollary of that study of the practice of states which has always been the strength of the positivist approach, and a jurisprudence which ignores these aspects of the situation is ignoring the realities of international relations. But this alone is not enough. If the underlying interests of states have received too little attention and study, there is another factor which tends to be completely forgotten. If there are divergent national interests, it is also true that in most questions there is an international interest. The purpose of the study of national interests alone might seem to point to local arrangements and particular solutions which if carried to extremes must mean the negation of law which, if it is to be law at all, must be general. The study of national interests should be merely preliminary to the construction of a general principle based on the international interest, modifying and comprehending the national interests which, viewed in their proper perspective, are seen to be merely the component parts of the international interest. The possibility of such a solution is implicit in the assumption of the existence of an international society. It is noticeable that this element is almost entirely lacking in the otherwise excellent preparatory work of the Bases of Discussion for the Hague Conference. The actual proposals for discussion were the work of legal draftsmen attempting an integration not of national interests but of legal formulae. Thus an essential stage in the work is omitted. For example, the suggested basis of discussion which sought to establish the three-mile limit of territorial waters, coupled with an attempt to make it more palatable by providing for the possibility of extension for certain unspecified purposes, was reached by counting heads and adopting the

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list of subjects for the 1930 Conference stated 'the Committee was at special pains to confine its inquiry to problems which it thought could be solved by means of conventions without encountering any obstacles of a political nature'. (See Doc. C. 196, M. 70, 1927 V.)

legal formula suggested by the bare majority. Neither agreement nor a workable rule will be reached by such a method. First there must be sought not the common denominator of legal formulae, but the common denominator of national interests, these being subjected to modification in the light of whatever is found to be the general international interest. Only after that stage can the draftsman usefully interpret the result in the form of a draft rule of law. To do otherwise is to ask the draftsman to draft without first briefing him on policy: a practice which is unthinkable in relation to municipal legislation but which is so common in international affairs as to pass almost unnoticed.

This process is a familiar one in the field of municipal legislation. The Government in the early stages of important legislation consults and obtains the advice of the various group interests which may be affected by the proposed legislation. Where they are conflicting it may attempt to reconcile them. In the light of the advice thus obtained the Government then formulates a policy which it conceives to be in the general national interest. This may be a compromise between group interests, it may be the adoption of one view to the exclusion of others, or it may be the formulation of a new policy distinct from the specific proposals of any of the groups. Nevertheless, it is easily seen in the municipal field how the consultation and study of group interests is a necessary preliminary to legislation if only to provide the information required for the formulation of a national policy. It is then, and only then, that the brief is handed to the draftsman to be drawn in the form of rules of law.[1] The reason why this all-important stage in the formulation of international law-making policy has been forgotten in the preparatory work for international conferences is that in non-technical fields there has hitherto been no adequate machinery for doing it. If substantial progress is to be made in the development of international law such machinery must be provided.

Such machinery would not be an entirely new departure in the international field. Considerable experience along these lines has already been gained in the more technical fields, where the need for it is more obvious: for example, the Universal Postal Administration, the International Committee on Weights and Measures, the Governing Body of the International Labour Organization, the Comité International de Navigation Aérienne which formerly administered the Paris Convention of 1919 (and actually had the power of amending the Annexes to the Convention by a majority vote), and its successor the International Civil Aviation Organization at Montreal. All these bodies have had considerable experience in doing very much the kind of preparatory work for the formulation of policy outlined above. They have their technical sub-committees dealing with specialized fields, they study national and international requirements, they collect and collate all necessary information and statistics, and serve to educate and enlighten the Governments themselves. On the basis of this work they formulate policy, call conferences, and draft conventions. They all have important successes to their credit. If such bureaux are necessary in specialized and comparatively new branches of international law, it is reasonable to suppose that they are necessary also for the proper development of law in its more traditional and familiar fields.

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[1] There is a lucid account of this process in Jennings, *Parliament*, chap. vii.

The Report of the Codification Committee is strangely silent on these points, and little or no provision seems to be made, at any rate in express terms, for the kind of specialized extra-legal study that the experience of the past seems to demand.[1] It is true, of course, that, as we have already seen, the I.L.C. is to have the power to consult scientific agencies, including other United Nations organs; but this possibility is necessarily limited to those fields where such bodies have been established. There is also the possibility that the General Assembly, when a draft comes before it, might investigate particular technical questions through one of its standing committees or through an *ad hoc* committee; but this kind of investigation should precede, not follow, the process of drafting. Perhaps it is assumed that something of this kind of work may be done by the Division of Development and Codification of International Law of the United Nations Secretariat, but this possibility is not referred to in the Codification Committee's Report, and in any case the Division is a purely legal body. It is very much to be hoped, therefore, that bureaux will be established for the necessary research and study into the economic, social, historical, strategic, and geographical factors which condition the law; unless something of the sort is done, it looks as if the study of what may broadly be called the political aspects of law-making will be reached for the first time at or after the drafting stage, which was precisely the weakness of the procedure employed at the Hague Conference of 1930.

[1] Not so the Report of the Inter-American Juridical Committee (*ubi supra*), which is accompanied by recommendations which state, *inter alia*: 'While it is recommended that the proposed codification committee, to which the name "Inter-American Codification Committee" has been given, should be a body of technical experts, the Juridical Committee would observe that the term "technical" should be taken in the sense appropriate to the character of the fields of law which it is proposed to codify. In the case of public international law many of the subjects which it would be desirable to codify involve questions of political policy as well as of legal principle. Hence the members of the Committee should be jurists who have not only a knowledge of the historical development of international law and of the rules of customary and conventional law, but also an understanding of the function of law as an instrument for the maintenance of law and order in the international community and the promotion of justice. The task of codifying international law is in large part a work *de lege ferenda*, the formulation of new rules to meet the changing conditions in the mutual relations of States. It has been observed by jurists of high standing that in no other field of human relationships has the law remained so far behind the conditions of the time. Hence the members of the proposed committee should be jurists who are in touch with the political, economic and social factors involved in the maintenance of law and order, and who are guided by a high sense of their obligations to promote international justice.'

IV. *The subject-matter of codification*

It seems generally to have been assumed that at any given time there are certain subjects which are, to use the phrase adopted in the instructions to the Hammarskjöld Committee preparatory to the 1930 Conference, 'ripe for codification' and certain subjects which are not. Such language seems to confuse several quite distinct and even conflicting factors that must be taken into consideration in the selection of topics for treatment and for the method to be employed in their treatment. For example, in general terms it might well be said that the English law of income tax is ripe for codification in the sense that codification is eminently desirable; but it is also true that it would be difficult to find any set of laws more difficult of systematic statement, being composed as it is of fragments unrelated by any coherent system of principle. It is also true that whether an attempted codification of the law would at any time be politically possible or opportune is a question quite distinct from that of the state of the law, and one that can be answered by statesmen but not by lawyers. So also in international law, the selection of topics must require an elaborate inquiry from many different points of view in order to determine both what may be done and how it should be done.

The Hague experiment in codification is particularly instructive on this important point. It will be remembered that the Hammarskjöld Committee chose eighteen subjects as being worthy of serious consideration,[1] and that from this list the Assembly of the League of Nations finally chose three: Nationality, Territorial Waters, and State Responsibility. The choice was curious and in many ways unfortunate. That it was on general grounds desirable to codify those subjects no one could doubt, but it seems odd that it was not realized from the outset that of the whole list of eighteen possible subjects, those three were perhaps the least likely to yield any result. It is, of course, easy enough to be wise after the event. Yet the fact that strikes an international lawyer immediately is that each of these three topics contains within itself some major and notorious conflict of doctrine. Nationality raises at once the vexed question of how far nationality laws are exclusively a domestic concern; the width of territorial waters has never in the whole history of international law been a matter on which states could agree; on the extent of State Responsibility there have always been two very distinct schools of thought which differ on questions of principle. On the other hand, two subjects which were rejected as being relatively unimportant—Piracy and Diplomatic Privileges—being older and mature branches of the law, and less likely to raise matters on which states might not be prepared to compromise, might very well have proved more amenable. It seems clear now that the Hague experiment was too ambitious and that the difficulties were under-estimated.[1] It would seem wise to give the new machinery a trial run on an easy subject. When some initial success has been achieved and the lessons learnt from the inevitable mistakes of technique, then will be time enough to tackle the more obstinate albeit more important topics. It would be interesting to make the experiment of attempting the codification of some comparatively easy and unimportant subject such as Piracy. It seems likely that success could fairly easily be achieved, and the experience gained might be invaluable.

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[1] The subjects were: (1) Conflicts of Nationality Laws; (2) Territorial Waters; (3) Diplomatic Privileges and Immunities; (4) State Responsibility for Damage done in their Territories to the Persons and Property of Foreigners; (5) Procedure at International Conferences; (6) Piracy; (7) Exploitation of the Products of the Sea; (8) Criminal Competence of States in respect of Offences committed outside their Territory; (9) Extradition; (10) Legal Status of Government Ships employed in Commerce; (11) Communication of Judicial and Extra-judicial Acts in Penal Matters; (12) Legal Position and Functions of Consuls; (13) Revision of Classification of Diplomatic Agents; (14) Competence of Courts in regard to Foreign States; (15) The Most-favoured-nation Clause; (16) Recognition of the Legal Personality of Foreign Commercial Corporations; (17) Commercial Corporations and their Diplomatic Protection; (18) Domicile.

In point of fact, two subjects seem already to have been chosen for the I.L.C. By a Resolution of 11 December 1946 the General Assembly directed the Codification Committee 'to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal'. The Committee decided that this would be better left to the I.L.C.,[2] and the Resolution of the General Assembly at its second Session in 1947, approving the recommendations of the Committee, specifically directs the I.L.C. when established to undertake this work. To codify one case seems an odd thing to do, and one would have liked to see as the first subject for the I.L.C. something more intimately concerned with the substantive law of peace. It very well illustrates the dangers of leaving the choice of subjects for codification to the temporary whims of a political assembly. The other subject, likewise referred first to the Codification Committee and then to the I.L.C., is the consideration of the Panama Draft Convention on the Rights and Duties of States.[1]

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[1] There is no need to be despondent over the failure at The Hague in 1930. There is no doubt that the chief thing lacking was time. It is inconceivable that a conference supplied only with 'bases of discussion' could succeed in codifying three major topics in some three weeks of working time.

[2] The Committee recommended unanimously that the I.L.C. should be invited to prepare: (*a*) a draft convention incorporating the Nuremberg principles; (*b*) a detailed draft plan of general codification of offences against the peace and security of mankind in such a manner that the plan should clearly indicate the place to be accorded to the Nuremberg principles. The Committee further expressed its opinion that this would not preclude the I.L.C. from drafting in due course a code of international penal law, but by a majority decided to draw the attention of the General Assembly to the fact that the implementation of the Nuremberg principles or of other international criminal law may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes. There is, however, already in existence a Convention (unratified) of 1937 for the creation of an International Criminal Court.

V. *Subsidiary methods of developing the law*

Concentration on the codification and development of the law by the conscious efforts of international organizations must not be allowed to obscure the fact that, even apart from such efforts, the flow of general law-making treaties reached through the initiative of Governments working through the old methods of diplomacy continues undiminished. This is indeed still far and away the main source of conventional law and is likely to continue to be so for some considerable time to come. The Committee considered various ways in which the I.L.C. might assist in improving the technique of multipartite instruments, and decided by a majority to recommend that the I.L.C. should consider 'the ways and means of bringing about improvements in the technique of multipartite instruments in relation to such matters as uniform treaty clauses with a view to ultimate recommendations to the General Assembly'. It was added that any model clauses suggested by the I.L.C. would, of course, only concern the formal clauses, and that their adoption or rejection would be entirely at the option of the parties.

This seems a sensible suggestion. Model clauses are a well-tried legal technique for securing uniformity, for saving time in drafting, and for simplifying the work of interpretation.[2] They are certainly not new to international law. They are a familiar feature of bilateral conventions for the granting of aviation facilities. Indeed, the Economic and Financial Organization of the League of Nations went much farther; it actually prepared model conventions for adoption by states as bilateral treaties. This was a highly successful experiment, especially in relation to the problem of double taxation. The Fiscal Committee of the Organization reported in 1935 that

> 'this procedure has the dual merit that, on the one hand, in so far as the model constitutes the basis of bilateral agreements, it creates automatically a uniformity of practice and legislation, while, on the other hand, inasmuch as it may be modified in any bilateral agreement reached, it is sufficiently elastic to be adapted to the different conditions obtaining in different countries or pairs of countries. The Committee is strongly of opinion that this procedure is likely in the end to lead to more satisfactory results and to have a wider and more lasting effect than the convocation of an international conference with a view to concluding a multilateral convention, even though it may at first attract less general attention and interest.'[3]

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[1] Doc. A/285.

[2] They have been widely and successfully used in English municipal legislation, e.g. the 'Clauses Acts'; see Jennings, op. cit.

[3] See Doc. C. 252, M. 124, 1935. II. A, p. 4. It is also cited in the Documents on the Development and Codification of International Law prepared by the Division of Development and Codification of International Law of the United Nations Secretariat, op. cit.

With such a wealth of experience already to hand, this technique is a promising one and should be given very careful investigation by the I.L.C. It is surprising that this recommendation of the Committee was only reached by majority, and that the suggestions are so tentative.[1] Though it is a technique obviously suited to technical rather than general conventions, it seems a pity, nevertheless, that the recommendation was limited to the formal clauses of conventions, for there is much else of this sort that the I.L.C. might usefully do. For in every system of law there are anomalies which vitiate the law to a lesser or greater extent, and which are essentially technical in that they do not contain any significant element of policy or interest. To remedy these inelegancies is a lawyer's task, but before Governments will take the required action it is almost always necessary to call their attention to the state of the law, to explain the technical deficiencies, and to make an acceptable and carefully prepared proposal for their reform. That kind of work is done in many countries by a Ministry of Justice. In England, extremely valuable work has been brought to fruition by the efforts of the Law Revision Committees set up from time to time by the Lord Chancellor. It is worth consideration that international law revision committees set up by the I.L.C. could fulfil a like function in international law, and it is obviously wise policy in the early stages of the organization to gain both experience and prestige by tackling the easier and purely technical and therefore less controversial aspects of international law reform. Experience has shown that Governments will usually support an international body which proves itself to be useful to them. The kind of example that immediately occurs is the standardization of some of the forms and returns and certificates required for various purposes by all countries. Thus, one of the most serious hindrances at the present day to easy air travel is the multiplicity of forms and returns to be made in every country visited. It may not be easy to persuade states to reduce their number, but it ought to be possible to persuade them to adopt uniform *pro formae* for those that are in common use.[2]

The Committee also recommended that the I.L.C. should study the ever-recurring problem of encouraging the ratification of and accession to multipartite conventions already concluded. This problem has already been very fully investigated by the League of Nations,[3] and it seems doubtful whether much could be added to their work short of making proposals for the drastic revision of treaty procedure. The Pan-American Organization, too, has unrivalled experience of the non-ratification of conventions, and has subjected the problem to more than one investigation.[1]

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[1] This recommendation, however, finds no place in the Statute.

[2] See Jenks, 'The Need for an International Drafting Bureau', in *American Journal of International Law*, 39 (1945), p. 163, for a stimulating discussion of the possibilities. He pleads, for example, for the preparation of books of reference such as: '(*a*) a manual of rules of style, (*b*) a subject index of the content of multipartite instruments, (*c*) a multilingual glossary of translations used in multipartite instruments consisting of rules in two or more languages, (*d*) a list of short titles of multilateral instruments.'

[3] Doc. A. 10. 1930. V.

The Codification Committee also considered the development of customary law and case law, and recommended that the I.L.C. should consider ways of making the evidences of customary law more readily available by the compilation of digests of state practice, and by the collection and publication of the decisions of national and international courts on international law questions.[2] The Committee must obviously have had in mind Moore's and now Hackworth's admirable digests of American practice on the one hand, and the wealth of material revealed by the *Annual Digest and Reports of Public International Law Cases* on the other.[3]

Conclusion

Opinion has moved a long way from the notion popular in this country a generation ago that codification was a dangerous fad occasionally subscribed to by lawyers who had the misfortune to be trained in a system other than the common law.[4] That view was based on the unfounded assumption that codification was confined to the admittedly questionable process of restating customary law in treaty form. It completely ignored the problem of reducing to some sort of order the growing chaos of conventional law. It completely ignored the need for law-making on a large scale to provide for entirely novel situations. There can be no question to-day that the convention is far and away the most important primary source of international law, both in what has already been accomplished (it has been estimated that between 1919 and 1946 over 700 multipartite treaties were concluded and, in the same period, 4,834 international instruments registered with the League of Nations) and in its potentialities. Case law, too, is an ever-increasing source of the first importance, as the volumes of that *Annual Digest and Reports* amply testify; but it must not be forgotten that the great majority of cases, at any rate in the international courts, are in fact concerned with the interpretation of treaties. Treaty law regulates a host of international matters which are the product of the modern age and to which customary law can make little or no contribution: foreign trade, international monetary arrangements, protection of industrial and literary property, civil aviation, transit and communications, postal arrangements, unification of private laws of cheques and bills, and so forth. The most important task of codification is the systematization and the progressive development of this amorphous and relatively unorganized body of law. It is surely evident that the implementing of Article 13 of the Charter is a task the urgency and importance of which yield place to none of the other problems that face the international lawyer to-day.

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[1] It is not surprising, therefore, that this recommendation of the Committee is rejected in the Statute of the I.L.C.

[2] This recommendation is adopted in Art. 24 of the Statute, which requires the I.L.C. to make a Report to the General Assembly on the matter.

[3] The value of scientific investigations of this type was also pressed in a resolution of the Institute of International Law at its meeting in Lausanne in 1947; see *Friedens-Warte*, 1947, p. 297.

[4] 'His Majesty's Government desire to point out that codification is rather a Continental than an Anglo-Saxon method of creating and clarifying a system of law . . .': Memorandum attached to the signature of His Majesty's Government to the Optional Clause of Art. 36 of the Statute of the Permanent Court of International Justice, 1929 (Cmd. 3452).

THE SETTLEMENT OF DISPUTES IN THE SECURITY COUNCIL: THE YALTA VOTING FORMULA

By YUEN-LI LIANG, S.J.D.

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I

ARTICLES 11 to 15 of the Covenant of the League of Nations were often described as the 'heart' of the Covenant, while Article 11 was invoked more often than any other article in the course of efforts to secure the peaceful settlement of disputes. It is probable that this will also be the position with regard to the corresponding part of the Charter of the United Nations, namely, Articles 33 to 38 of its Chapter VI. Though, like the Covenant, the Charter lays less emphasis on the settlement of disputes than on the maintenance of international peace and security, it is clear that the pacific settlement of disputes was regarded by the authors of the Charter as one of the means to attain the latter end. Article 1 of Chapter I (Purposes and Principles) enumerates, as the first purpose of the United Nations, the maintenance of international peace and security. To achieve this purpose the United Nations is: (1) to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and (2) to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. It is perhaps not by mere accident that the pacific settlement of disputes, juxtaposed with enforcement measures, was given a secondary place in Article 1. Drafted at a time when the Second World War was approaching its end, the Charter naturally reflects the anxious preoccupations with peace and security and, consequently, places stress on enforcement measures.

The function of the pacific settlement of disputes in the system of the Charter is, however, somewhat different from that in the Covenant. Under the system of the Covenant, war or the threat of war was not absolutely proscribed and was in certain cases even explicitly allowed. In the tradition of the Hague Conferences the methods of pacific settlement under the Covenant were intended to serve as substitutes for 'settlement by the ultimate resort to war', which in traditional international law was recognized as a legal method for the settlement of disputes. The system of the Charter follows the conception of the Kellogg–Briand Pact in attempting to sever the link between the condemnation of war and the obligation of pacific settlement.[1] It goes farther in not limiting its provisions to a mere 'renunciation of war as an instrument of national policy', but also in laying down as a positive obligation that 'all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations' (Article 2, paragraph 4).

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[1] This article was prepared by the author in June 1946. It does not therefore take account of the events subsequent to that date. Any views expressed in the article are the personal views of the author and, except where indicated, they are not necessarily identical with those of the government or organization with which he was connected. [*Ed.*]

The obligation of pacific settlement is also the subject of another principle of the Charter. Article 2, paragraph 3, provides that 'all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. This principle may be construed as an implied recognition that while the primary function of the United Nations is not to settle all differences between the states, the pacific settlement of disputes will exercise a preventive function and that the cumulative effect of pacific settlement will create gradually a favourable international atmosphere in which threats to peace and security are not likely to take place. To carry out this principle detailed provisions are laid down in Chapter VI entitled 'Pacific Settlement of Disputes', in which the obligations of the parties in dispute are reaffirmed, the role of the Security Council, in particular, is defined, and the process of pacific settlement specifically set forth.

A close examination of the text of Chapter VI, particularly in the light of the proceedings in the Security Council during the first six months of its existence, reveals, however, that this chapter of the Charter, the articles of which will almost inevitably be invoked whenever the Security Council is called upon to exercise its functions, gives rise to various difficulties. Some of these were expected; others were hardly anticipated by the authors of Dumbarton Oaks and San Francisco. There is no doubt that Articles 33 to 38 owed their inspiration and even their technique to Articles 11 to 15 of the League Covenant.[2] Commentators on Chapter VI of the Charter agree in describing Articles 33 to 38 as obscure in content, laboured in construction, and confusing in arrangement.[1] The lack of clarity in its provisions has been responsible for serious disagreements, and the difficulty is augmented by the fact that, like the Covenant, no provision is made in the Charter as to who is the proper authority to interpret it. Despite numerous amendments proposed at San Francisco, the text of Chapter VI remained largely as it had been at Dumbarton Oaks, the efforts at improvement of its articles having been successfully resisted. Some changes in rearrangement which were finally adopted increased the confusion regarding the process of pacific settlement. In a few instances they resulted in raising serious doubts as to matters of substance.[2]

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[1] Jean Ray in *Commentaire du Pacte de la Société des Nations* (1930), p. 404, after criticizing the phrase 'likely to lead to rupture' in Art. 12 of the Covenant, says: 'En réalité il y aurait peut-être avantage à ne pas maintenir entre les deux questions (la renonciation à la guerre et le recours aux procédures pacifiques) une excessive solidarité, à condamner la guerre purement et simplement, et d'autre part à établir les procédures pacifiques. . . . Le jour où ces idées auront pénétré dans les consciences, il faut reconnaître que l'échafaudage idéologique sur lequel repose l'article 12 tombera en morceaux.'

[2] Although Art. 11 of the Covenant, after undergoing many metamorphoses, was regarded as a loosely drafted article, Arts. 12 to 15 were couched in definite and precise language, or, as Sir John Fischer Williams says, 'as nearly precise as international documents can be and almost legal' (*Some Aspects of the Covenant of the League of Nations* (1934), p. 135).

Apart from the difficulties resulting from the obscurity of the provisions of Chapter VI, the operation of the system of pacific settlement faces the more formidable problem of how far the requirement of unanimity of the permanent members of the Security Council is applicable to the decisions of the Security Council under the provisions of this chapter. In other words, under Article 27—the so-called Yalta Voting Formula—to what extent are the decisions of the Security Council subject to the veto of one permanent member?

It is proposed in the following pages: (1) to survey briefly the drafting history of the provisions of the Charter regarding pacific settlement; (2) to analyse the system of pacific settlement in Chapter VI in terms of its operation; and (3) to examine the relation of the Yalta Voting Formula to the decisions of the Security Council.

II. *The history of the provisions of the Charter*

Article 1 of Chapter I of the Charter (Purposes) corresponds to paragraph 1 of Chapter I of the Dumbarton Oaks Proposals, which reads:

> 'The purposes of the Organization should be: 1. To maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression and other breaches of the peace, and to bring about by peaceful means adjustment or settlement of international disputes which may lead to a breach of the peace.'

This was the text which was agreed to during the first phase of the Dumbarton Oaks Conversations by the three participating Governments, namely, the United Kingdom, the United States, and the Soviet Union. When China joined these conversations in the second phase, its delegation proposed, in respect of this article, that the provision should be added that

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[1] Report of the Canadian Delegation on the San Francisco Conference, p. 34; Eagleton in *American Journal of International Law*, 40 (1946), p. 513; Hudson, 'Disputes before Organs of the United Nations', in *Edmund J. James Lectures on Government* (delivered in 1946 at the University of Illinois, U.S.A.); Goodrich, 'The Pacific Settlement of Disputes', in *American Political Science Review*, 39 (1945), p. 968.

[2] See *infra*, pp. 347 ff.

'the settlement of international disputes should be on the basis of the principles of justice and international law'. It was pointed out that the new organization was of such far-reaching importance that some reference should be made to some general principles by which the new organization should be guided in its task of resolving international conflicts or disputes. To the great body of states as well as to the parties to a dispute or to states directly interested in a situation the principle thus enunciated would serve as a guaranty that the dispute or situation in question would always be resolved on the basis of justice and law.

This proposal was amended by the two other participating Governments in the second phase of the Dumbarton Oaks Conversations, namely, the United Kingdom and the United States, to read: 'The adjustment or settlement of disputes should be achieved with due regard for the principles of justice and international law.' At the San Francisco Conference this proposal was among the joint proposals presented by the four sponsoring Governments. Other delegations also proposed similar amendments tending to emphasize more strongly the concept of a legal order in the new international organization.[1] The proposal of the sponsoring Governments was finally adopted in the form originally proposed by China, and became Article 1 of the Charter, in which it is stated that one of the Purposes of the United Nations is '. . . to bring about by peaceful means, *and in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.[2] In keeping with this addition a corresponding addition was introduced into paragraph 3 of Article 2 (Principles), in which it is laid down that all Members shall settle their international disputes by peaceful means in such a manner that international peace and security *and justice* are not endangered.[2]

As to the core of the system of pacific settlement in the Charter, namely, Chapter VI, corresponding to Chapter VIII, Section A, of the Dumbarton Oaks Proposals, it is to be regretted that no thorough redrafting was undertaken at the San Francisco Conference. There was general dissatisfaction with the fact that the provisions of Chapter VIII, Section A, of the Dumbarton Oaks Proposals were obscure, particularly as regards when and in what manner the Security Council should and could intervene in assuming jurisdiction over international disputes. The nature of the recommendations of the Security Council was also left in doubt. The categories of disputes over which the Security Council was given jurisdiction were far from being clear. The report of the Rapporteur of the

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[1] For these amendments see *United Nations Conference on International Organization: Selected Documents* (Washington: Government Printing Office, 1946), pp. 89–109.

[2] Italics are the writer's.

Technical Committee dealing with this Chapter (Committee III/2) was the shortest of all the reports of the Technical Committee, and in view of the complexity of the subject it could hardly be regarded as adequately reflecting the state of discussions in that committee.[1]

When the text as approved by the Technical Committee went to the Co-ordination Committee, the labours of the latter Committee were already at their concluding stage and there was the necessity of finishing its work by a set date. Besides, the Co-ordination Committee, though it had the benefit of consultation with the Advisory Committee of Jurists, was not given wide powers to make modifications likely to touch on matters of substance. While a few changes were made, they did not constitute important improvements.

The reasons for the failure to introduce some clarity into Chapter VI of the Charter are not far to seek. They are mainly to be explained by the general reluctance of the sponsoring Governments to make sweeping alterations in the Dumbarton Oaks Proposals which had involved no small measure of negotiation and compromise. In respect of this particular Chapter, it was apparently the conviction of the sponsoring Governments that the Security Council, being the primary organ of the United Nations charged with the responsibility for the maintenance of peace and security, should not be fettered by precise and legalistic rules but should possess the widest latitude and the largest flexibility in dealing with international disputes. The middle and small Powers at San Francisco, having concentrated their energies upon the defeat of the veto, were too preoccupied to make their best contribution to the redrafting of the Chapter on pacific settlement.

While some amendments to Chapter VIII, Section A, of the Dumbarton Oaks Proposals were calculated to improve the Charter,[2] certain others have definitely produced results which are unsatisfactory in relation to the interpretation and application of its provisions.[3] For instance, the insertion of the word 'situation' and its juxtaposition with the word 'disputes' have since thrown doubts upon the extent of the applicability of the requirement of abstention by a permanent member under Article 27, paragraph 3. The transposition of the provision concerning the request for advisory opinion (paragraph 6 of Chapter VIII, Section A) and of the domestic jurisdiction clause (paragraph 7 of the same section) to other parts of the Charter was effected without taking into account the risk that when these two provisions are no longer found in the Chapter on pacific settlement, decisions on these two matters by the Security Council, originally covered by the Yalta Voting Formula, might be construed to be subject to the veto by one permanent member, a party to a dispute, as Article 27, paragraph 3, *only* prescribes that in decisions under Chapter VI and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting. The subject is discussed later in this article.[1]

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[1] United Nations Conference on International Organization, Report of the Rapporteur of Committee III/2, Doc. 1027, III/2/31(1), pp. 1–6, *U.N.C.I.O. Documents*, vol. xii, pp. 159–64.

[2] For example, the United Kingdom proposal which became one of the joint proposals presented by the four sponsoring Governments and adopted by the Conference as Art. 38. 'Without prejudice to the provisions of Articles 33–7, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.' It was also due to a proposal of the sponsoring Governments, based on the initial proposal of the United Kingdom, that Art. 37 of the Charter now contains the provision that the Security Council may make recommendations on *terms of settlement* as distinguished from procedures or methods of adjustment as provided for in Art. 36. China was the original proposer of the provision in Art. 35, para. 2, regarding the bringing of a dispute to the Security Council by a non-Member on the condition that it accepts the obligations of pacific settlement.

[3] See Eagleton in *American Journal of International Law*, 40 (1946), pp. 519 ff., in which he discusses fully some of the results of the drafting changes. In particular, he points out (p. 519, n. 20) that the transfer of para. 2 of Art. 33 ('The Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means') to its present position 'was illogical

III. *The system of pacific settlement under Chapter VI*

In order to clarify the provisions of Chapter VI, efforts were made, after the San Francisco Conference, to classify the various steps in the process of pacific settlement in a logical order and to explain the correlation of each step to the entire system. The reports of the Canadian delegation to the San Francisco Conference and of the Australian delegation throw considerable light on what is described in the Canadian report as 'continuing obscurities'.[2] For the present purpose it may be of interest to analyse the provisions of Chapter VI in terms of the problems raised therein and from the point of view of the possibilities of their application in practice.

i. *The primary obligation of the parties to settle their disputes by peaceful means of their own choice.* Paragraph 1 of Article 33 was advisedly put at the head of Chapter VI in order to emphasize the primary obligation of the Members of the United Nations to settle their disputes by means of their own choice. The paragraph enumerates the traditional methods of pacific settlement which the parties are exhorted to employ. It is not until the parties fail to settle a dispute by any of the means indicated that they are under the obligation to refer it to the Security Council. It seems that, on a strict interpretation, the parties, or at least one of the parties, should have the onus to prove that peaceful means of one sort or another have been resorted to. It is not clear, however, whether all of the means enumerated

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and produces confusion. The paragraph is in any case unnecessary, since this right of the Council to exhort the parties is three times repeated in Chapter VI.'

[1] See *infra*, pp. 347 ff.

[2] Report of the Canadian Delegation, p. 34; Report of the Australian Delegation (Canberra, 1945), paragraph 118, p. 25.

in Article 33 must have been exhausted. Dr. Pasvolsky, explaining Article 33 to the United States Senate Committee on Foreign Relations, was apparently of this view. He said: 'If they [the parties] refer a dispute to the Security Council, the chances are that the first thing that the Security Council would do would be to say to them, "Have you exhausted the means enumerated in Article 33 and any other means that you could think of for settling this dispute?" '[1] Similarly, in the Syria–Lebanon case Mr. Stettinius pointed out that the possibilities of Article 33 had not yet been exhausted by the parties,[2] and M. Bidault even doubted whether a dispute had arisen. He said: 'If there is a dispute, then it must be settled under Article 33 which recommends that the disputes shall be settled in the first place by means of negotiations, and it does not set any limit to the scope of those negotiations. If, on the other hand, Article 33 does not apply, then there is no dispute involved.'[3]

The injunction against prematurely bringing a matter to the Security Council is not likely to be invariably obeyed. Despite the statements of Dr. Pasvolsky and Mr. Stettinius, quoted above, it is not possible to take too literally the requirement, 'exhaustion of the means of peaceful settlement', for it is obviously not intended that the parties should go through the gamut of all the means enumerated in Article 33. There is no doubt that it is in the interest of the Security Council not to be flooded with complaints, but the real antidote against a multiplicity of premature complaints lies in the effective development of bilateral and multilateral treaties for pacific settlement, which will make it easy for the parties to make use of the machinery or agency provided for the purpose. The tendency in the Security Council so far seems to encourage the discussion and consideration of all complaints and sometimes even to proceed to an examination of the merits of the complaints. The League Council, on a number of occasions, and in respect of secondary disputes, adopted 'the wise policy of inviting the parties to come to an understanding outside the League'.[4]

Paragraph 1 of Article 33 restricts the obligation of pacific settlement to those disputes 'the continuance of which is likely to endanger the maintenance of international peace and security'. In one respect, this restriction is open to criticism in that it is a backward step as compared with the League Covenant. In the Covenant under Article 13, the Members agreed that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration or judicial settlement, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement. There was no qualification that such a dispute had to be one 'likely to lead to a rupture'. As a matter of fact, disputes endangering the maintenance of peace and security have been traditionally regarded as unsuitable for arbitration or judicial settlement in the present stage of the development of the international judicial process.[1]

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[1] *Hearings before the Committee on Foreign Relations*, U.S. Senate, 79 Congress, 1st Session (hereinafter cited as *Hearings*), p. 272.

[2] *Security Council Journal* (No. 16), p. 291.

[3] Ibid., pp. 346–7.

[4] Ray, op. cit., p. 381.

There is another question of some importance in connexion with paragraph 1 of Article 33: Who determines the type of disputes which the parties are under the obligation to settle by peaceful means of their own choice? Surely not the Security Council, for that body is not called upon to act at this initial stage, unless it avails itself of paragraph 2 of the same article, in which case it may have to act first under Article 34. The Security Council, according to paragraph 2 of Article 33, shall, when it seems necessary, call upon the parties to settle their disputes by peaceful means. It has been argued that it is mandatory upon the Security Council to issue that call to the parties. This interpretation is not convincing in view of the qualifying clause 'when it deems necessary', which implies discretion.[2] In the absence of the 'call' of the Security Council, it would seem that the determination required in Article 33 as to the seriousness of a dispute would necessarily be subjective, i.e. depending upon the parties themselves. This may entail the emasculation of the obligation to the point of making it almost illusory.

An attempt was made in the Co-ordination Committee at San Francisco to reconcile Article 2, paragraph 3, which provides that 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered', with Article 33, paragraph 1. It was suggested that the language of the latter part of Article 2, paragraph 3, should also be used in Article 33, in order to replace the qualifying clause in the latter article as to the type of disputes which must be submitted to pacific settlement. The paragraph would therefore read: 'The parties to any international dispute shall . . . so that the maintenance of international peace and security will not be endangered.' The Committee of Jurists advised against the change on the ground that it would mean a change of substance. As these two articles now stand there is an apparent incompatibility in respect of the type of disputes which must be submitted to pacific settlement and, consequently, in respect of the extent of the obligation of the parties. It is not a persuasive argument that there is a 'hierarchy of norms' as between the two articles. To the thesis that the principle contained in Article 2, paragraph 3, should prevail over Article 33, paragraph 1, it may be answered that Article 33, being a more precise formulation, should override a general statement of principle.

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[1] See, for example, Hudson, *International Tribunals* (1944), p. 249.

[2] In the meeting on 19 June 1945 of the Co-ordination Committee of the San Francisco Conference, Dr. Evatt argued that such a 'reminder' would spare the Organization and its Members many serious difficulties and under this formula the only discretion the Security Council would exercise would be, not the manner in which it would call upon the parties, but the time when it called upon them. In summing up the discussion Dr. Pasvolsky, the Chairman, noted that under Art. 33 the parties concerned would make the determination as to whether they should carry out their obligation and the Security Council would make a determination in deciding whether the parties were carrying out their obligation. Next, the Security Council had to decide whether in the particular circumstances at a particular time it would be useful to intervene in the sense of calling upon the parties to settle their dispute. This interpretation met with no objection from the members of the committee.

ii. *The determination by the Security Council whether the continuance of a dispute or situation is likely to endanger peace and security.* Apart from Article 38, which applies to 'any dispute', in so far as the parties *agree* to refer it to the Security Council, it has been argued that before the Security Council can make any recommendation, either of procedure of adjustment or of terms of settlement, there must be a *décision préalable* that a dispute or a situation exists whose continuance is likely to endanger the maintenance of peace and security. Professor Eagleton, in a penetrating essay, has vigorously defended this view.[1] He cited the statement of Mr. Stettinius in the case of Greece that 'without such a finding the Council has no authority to recommend procedures or methods of settlement'. He emphasized that 'the only type of dispute which the parties are obligated to settle, and only one with regard to which the Security Council is permitted to make recommendations either of procedure or of terms of settlement, is one "the continuance of which is likely to endanger the maintenance of international peace and security" '.[2]

The formula 'endangering international peace and security' is reminiscent of that contained in Articles 12 and 15 of the League Covenant: 'likely to lead to a rupture'. The restriction of the jurisdiction of the League Council to major disputes under these two articles was presumably based upon the maxim *de minimis non curat praetor*, as it was thought that an august world council should not be called upon to deal with trivial matters. On the other hand, the practical working of this principle could often produce paradoxical consequences. For a party desiring the Council to assume jurisdiction over a dispute had it in his power to aggravate the dispute and to provoke a serious tension in order to bring the dispute within the meaning of Article 12 or 15 of the Covenant, while the other party which originally might have been the *provocateur* would make peace protestations in order to minimize the dispute and thus to demur to the jurisdiction of the Council.[1]

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[1] Eagleton, loc. cit., pp. 513–33.

[2] Ibid. p. 523. Cf. Report of the Canadian Delegation, p. 34: 'Apart from one exception, the only disputes or situations which the Security Council *can* deal with are the disputes which it *must* deal with. [Italics in the original.] Under this chapter it can deal only with disputes or situations which are likely to endanger peace and security.' The Soviet representative (Vyshinsky) in the first Iranian case stressed during the initial stage of the consideration of the case by the Security Council that the claims of Iran 'cannot be discussed by the Security Council since they do not meet the conditions specified in the Charter' (*Security Council Journal* (No. 48), pp. 53–7). Whether the Security Council can 'discuss' a case before its determination whether the dispute or situation endangers the maintenance of peace and security is treated below.

The early practice at least of the League Council seems to have been not to rely upon the contention of a party asserting that a dispute was likely to lead to a rupture, and, before inquiring into any point, to decide whether, in fact, such description was well founded. The Council would estimate the gravity of the dispute and determine the course of its action accordingly.[2] In other words, the Council did not give too literal an interpretation to the term 'likely to lead to a rupture'. For instance, it took jurisdiction over the dispute concerning the Tunis and Morocco Nationality Decrees under Article 15.[3]

Under Chapter VI of the Charter, however, it would seem that the discretion of the Security Council in this respect is more limited. There is a clear mandate that the Security Council should confine its power of recommendation-making to disputes or situations of the defined type only. As Dr. Pasvolsky said:

> 'The Security Council is empowered to make investigations here (Article 34) for a definite purpose—for the purpose of determining whether or not the continuance of a dispute or situation is likely to endanger the maintenance of peace and security, because the Security Council, as is indicated later on, takes action only when it determines that a particular dispute is of such a nature that its continuance is likely to endanger the maintenance of international peace and security.'[4]

It may be necessary to draw a distinction between the question as to the category of disputes or situations with which the Security Council can and must deal and the question whether a determination, i.e. a formal decision by the Security Council, is necessary before it can make recommendations. In respect of the first question, there appears to be no doubt that the Security Council has to justify its action in the making of recommendations by reference to the type of disputes or situations of which it is seized. Perhaps the very fact that a recommendation is made would indicate that the Security Council has reached the conclusion that the dispute is of the nature referred to in Article 33, or that the situation is of a like nature. In respect of the second question, it may be open to doubt whether a formal determination must in all cases be made before the Security Council can act under Article 36 or Article 37. It may be too much to expect that a political organ like the Security Council should abide by and follow a rigid progression of schematic process in terms of individual decisions like a court of common law. It may also be urged that Article 34 is by no means of a mandatory nature: it authorizes the Security Council to investigate, when it deems necessary, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security, but it does not require the Security Council to do so when the Security Council is already convinced by the objective facts as revealed in the proceedings before it that the dispute or situation is of the nature envisaged.[1]

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[1] See the incisive discussion of this point in Ray, op. cit., p. 403.

[2] Conwell-Evans, *The League Council in Action* (1929), p. 13.

[3] Oppenheim, *International Law*, vol. ii (6th ed., 1940), p. 88, note 4. Cf. Hudson, 'Disputes before Organs of the United Nations', loc. cit., where he mentions the *Finnish Ships* case (1932–5) and the *Swiss War Damages* case (1935), in which the League Council found itself lacking in competence to follow any useful procedure because of the secondary character of these two disputes.

[4] *Hearings*, p. 271. He adds: 'The Security Council, however, has to be the judge as to whether the dispute is of such a nature that it should intervene and take action.' Cf. Goodrich and Hambro, *Charter of the United Nations: Commentaries and Documents* (1946) (hereinafter cited as Goodrich and Hambro), p. 142.

The practice of the Security Council in the cases of which it has been seized has been to pass over the necessity of such determination.[2] It has followed, unwittingly or unwillingly, the early practice of the League Council as shown above. There may have been an additional reason for that practice. The determination, being a decision on a non-procedural matter, would require, under the Yalta Voting Formula, the unanimity of all the permanent members, as would a decision on investigation under Article 34 or a decision on making a recommendation under Article 36 or Article 37. The Security Council, during its first six months, did not endeavour to make any recommendation. It is believed that when it does decide to do so, it will probably proceed upon the inarticulate premiss that a determination has already been implicitly made.

iii. *Consideration and discussion—Investigation—Recommendation.* The Security Council can be seized of a dispute or a situation under Chapter

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[1] Wehberg, in *Die Friedens-Warte*, 45 (1945), p. 367. As compared with Art. 34, it is arguable that under Art. 39 of Chapter VII the determination of the existence of any threat to the peace, breach of the peace, or act of aggression has to be a formal decision, as the language is more peremptory.

[2] In the course of the discussion of the Greek question in which the U.S.S.R. in a note of 21 January 1946 asked the Security Council to discuss the situation in Greece, Mr. Bevin asked the Security Council to insert in a draft resolution proposed by Egypt words to the effect that the presence of British troops in Greece 'does not constitute a threat to international peace and security' (*Security Council Journal*, No. 8, p. 130). Mr. Vyshinsky declared that he did not agree that 'we should say that the presence of British troops does not constitute a threat to international peace and security' and that according to Article 27 of the Charter no decision could be reached by the Security Council, because the Soviet Union 'declares itself against this resolution' (ibid., p. 134). No decision was taken on the draft resolution by the Security Council. It may be observed that the draft resolution in question was intended more as a judgment of the Security Council on the merits of the Soviet complaint than as a determination as to whether the 'situation' created by the presence of the British troops in Greece was of the nature referred to in Art. 33 of the Charter, a determination for the purpose of empowering the Security Council to make recommendations under Art. 36.

VI in the following ways: (1) under Article 35 by a state, whether Member of the United Nations or not; (2) under Article 33, paragraph 2, and Article 34 by the Security Council itself, presumably on the proposal of one of its members; (3) under Article 37, paragraph 1, by the parties to the dispute; and (4) under Article 99 by the Secretary-General. Also under Chapter IV, Article 11, paragraph 3, the General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

It is obvious from what has been said that though the Security Council may be seized of a dispute or situation of whatever type, it does not mean that the Security Council can exercise all the powers conferred upon it under Chapter VI, unless it has determined, explicitly or implicitly, that the dispute or situation is likely to endanger the maintenance of international peace and security. To be seized of a dispute or situation simply means in practice that the Security Council has included the dispute or situation in its agenda of business.

The first stage in the deliberations of the Security Council is the stage of consideration and discussion. These two words do not appear in Chapter VI, but they are necessarily implied in the powers of the Security Council. They acquired a major importance because of the controversial voting issue they raised in the course of the drafting of the Joint Statement of the Sponsoring Governments on the Voting Procedure of the Security Council and of the prominent place given to them in the Joint Statement itself. At San Francisco there was no authoritative meaning given to the phrase 'consideration and discussion', though Dr. Evatt in his analysis[1] of the Joint Statement attempted to attribute a broad meaning to 'discussion' and 'consideration'. He contended that the words 'consideration and discussion' were used in the Joint Statement in a much narrower sense than they commonly would bear and that in ordinary speech 'consideration' of a dispute would include 'calling for report, hearing witnesses, or even the appointment of a commission of investigation'. He admitted, correctly, that under the Joint Statement it was the intention of the sponsoring Governments to limit the meaning of 'consideration and discussion' to a stage of 'very preliminary and restricted character'. In the Joint Statement the emphasis on the importance of making explicit the 'right' of 'consideration and discussion' and its freedom from the veto arose initially from a statement made by the United Kingdom delegate in Committee III/1 that one permanent member alone could not prevent the investigation of a dispute by the Security Council. He used the word 'investigation' in its broadest sense—in a sense similar to that in which Dr. Evatt in his analysis understood the word 'consideration'—to include the general discussion of a matter with a view to finding out the facts and not to limit it to the conducting of a formal investigation.[1] The United Kingdom delegate was not supported by the other sponsoring Governments in subsequent consultations amongst the delegations of these Governments. Accordingly, in the Joint Statement the narrower sense of the word 'investigation' was used and agreed to by the United Kingdom.[2]

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[1] Document 897, III/1/42, p. 9, *U.N.C.I.O. Documents*, vol. xi, p. 438.

Investigation was, therefore, understood as a process which 'may involve calling for reports, hearing witnesses, despatching a commission of enquiry, or other means'. Since the sponsoring Governments—and later France—in the Joint Statement agreed that 'investigation' should be subject to the veto, they undertook, after considerable consultations among themselves, to emphasize in the Joint Statement that prior to 'investigation' as used in the narrower sense in Article 34, there could be and should be a previous stage in the deliberations of the Security Council which would be free from the veto of one permanent member.

This emphasis has proved to be justified in the practice of the Security Council. The Security Council has, in the matters brought before it, made ample use of this phase of its deliberations and has refused to have its 'consideration and discussion' stifled by proposals to have matters 'deleted from its agenda'. In point of fact, apart from the appointment of a subcommittee to study and report on the Spanish question, the Security Council seems to have encompassed the entirety of its deliberations within the phase of 'consideration and discussion' in the other questions of which it was seized during the first six months.[3] It did not proceed to the next stage, i.e. investigation.

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[1] Sir John Fischer Williams (*Chapters on Current International Law and the League of Nations* (1929), p. 439) apparently held a similar view in his interpretation of the word 'investigate' contained in Art. 5 of the League Covenant. He said: 'the addition of "including the appointment of committees to investigate particular matters" makes it clear that the general words "matters of procedure" include one class at any rate of definite decisions as steps in the investigation of particular matters before the Council—such as, for example, a "war or threat of war" which is being considered under Article 11 of the Covenant.'

[2] For detailed discussion of this question see Wellington Koo, Jr., *Voting Procedures in International Political Organizations* (1947), Chapter IV.

[3] Although the Charter and the Rules of Procedure of the Security Council contain adequate provisions governing the manner in which matters may be brought to the attention of the Security Council and included on the agenda of a particular meeting, no clear indication is given as to how the Security Council may dispose of a matter once it has become seized of it. An analysis of the practice of the Security Council indicates the following possible ways: (1) A recommendation under Chapter VI. So far the Security Council has made no recommendations under Chapter VI, but if such a recommendation were made, the case would be closed, leaving the parties to carry out the recommendations. (2) A decision under Art. 34 to the effect that the matter brought before the Security Council does not endanger the maintenance of international peace and security. So far the Security Council has not been successful in closing a matter by such a decision. (3) A statement that the Security Council has taken note of the declarations made before it by the parties concerned and that it considers the matter to be closed. This was the solution adopted by the Security Council in closing the question of the presence of British troops in Greece. (4) A tacit recognition that the matter is closed when all substantive resolutions proposed in connexion with the solution of the question have failed of adoption. This was the

In the second Iranian case, though the Security Council was requested to remove from the agenda the complaint of Iran on the ground that both parties to the dispute had reached an agreement, the Security Council refused to do so,[1] basing its decision apparently upon a report from the Committee of Experts[2] in which the majority held that 'even after an agreement has been reached between the parties, circumstances may continue to exist (for example, the conditions under which the agreement has been negotiated) which allow fears regarding peace to subsist and which justify the maintenance of the question in the list of matters with which it is concerned'. The majority opinion in the report conceived a broad basis for the authority of the Security Council, pointing out that the Charter 'has in fact invested the Security Council, especially under Article 24, with certain political functions of primordial importance by conferring on it the primary responsibility for the maintenance of international peace and security'. In the Committee of Experts the view was also voiced that the Security Council does not have to take a decision under Article 34 to 'investigate', *immediately* after it is seized of a dispute or a situation, and that the Security Council has full discretion to keep a dispute or a situation under watch, and, if it deems appropriate, to make at any time the determination envisaged under that article.

No decision as to the making of a recommendation was taken by the Security Council during the first six months of its existence. In the Spanish question a decision to make a recommendation to the General Assembly as proposed by the Sub-Committee was prevented by a veto from being adopted.

Under Chapter VI, the recommendations of the Security Council fall into two categories: (1) recommendations of appropriate procedures or methods of adjustment (Art. 36), and (2) recommendations of terms of settlement

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manner in which the Indonesian question was brought to a close. It may be noted that in the Syria–Lebanon question, the final draft resolution was vetoed. It cannot, therefore, be said that any decision was reached. However, both the United Kingdom and French representatives announced that they would abide by the 'decision of the majority' in any case, and both the United Kingdom and France subsequently kept the Council informed of their actions regarding the withdrawal of their troops from Syria and Lebanon. Upon the expression of satisfaction with the outcome of negotiations by Syria and Lebanon, notified to the Secretary-General of the United Nations, the Secretary-General in his report of 1946 considered the case closed. (5) A decision to adjourn *sine die* the consideration of the matter but to leave it upon the list of matters of which the Security Council is seized. This was the manner in which actual consideration of the second Iranian case and the Spanish case was terminated. (6) A procedural decision by the Security Council to proceed to the next item upon its adopted agenda.

[1] *Security Council Journal*, No. 30, p. 597. The Security Council rejected a French draft resolution which in substance incorporated a Soviet proposal requesting the removal of the Iranian question from the agenda. The Soviet representative then made a statement to the effect that 'in view of the existence of the agreement between the Soviet and Iranian governments on all questions in dispute and in view of the withdrawal by Iran of its appeal, the Soviet Government considers that the decision of the Security Council to retain the Iranian question on its agenda is contrary to the Charter of the United Nations'.

[2] *United Nations Document* S/42 (18 April 1946).

(Art. 37). Recommendations of terms of settlement can only be made under Article 37, which contemplates the case where: (1) the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that article, and (2) the parties refer it to the Security Council. In Committee III/2 of the San Francisco Conference the question was raised whether the parties must agree to refer the dispute to the Security Council. If this were the intention of the article, considerable delay would ensue and the entire provision might be rendered nugatory. An interpretative statement by one of the delegates[1] was accepted by the Committee to the effect that should one party violate its obligation under Article 33, the other could bring the matter before the Security Council. Under this interpretation it would seem that the power of the Security Council to make recommendations of terms of settlement is as wide as that of making recommendations of appropriate procedures or methods of adjustment, since the conditions under which the Security Council may act under Article 37 in making this type of recommendations are not essentially different from those under which it may act under Article 36.

Another problem connected with the nature of the recommendations under Article 36 of Chapter VI is whether these recommendations must pertain to 'peaceful methods or procedures of adjustment'. That is to say, must these methods and procedures be of similar character to those indicated in Article 33? This problem was raised in the Spanish question, where the report of the Sub-Committee suggested that the Security Council should recommend to the General Assembly that it pass a resolution recommending that diplomatic relations with the Franco régime be terminated by each Member of the United Nations. Though the Security Council itself did not enter into this juridical question at any length, it was open to doubt whether the Security Council has the power under Article 36, paragraph 1, to make a recommendation suggesting in concrete terms and envisaging as an ultimate result the severance of diplomatic relations, which, by its very nature, is a coercive measure and which is listed in Article 41 as a measure of enforcement.[2]

[1] Document 433, III/2/15, p. 1 (17 May 1945), *U.N.C.I.O. Documents*, vol. xii, p. 47; see also Goodrich and Hambro, op. cit., p. 152. This interpretation seems to be in accord with the interpretation of Art. 22 of the Paris Agreement between Yugoslavia and Hungary by the Permanent Court of International Justice on the question of jurisdiction. To the objection of Yugoslavia that there had been no attempt to reach agreement on the question of choosing an arbitrator, the Court said: 'it is easy to perceive that that refers and can only refer to the non-fulfilment of a condition of fact. . . . Any other interpretation of the words in question would involve a condition the fulfilment of which would be dependent on the will of either of the interested parties' (the *Pajzs*, *Csáky*, *Esterházy* case, *P.C.I.J.*, Series A/B, No. 68, p. 62 (1936)).

[2] Cf. statement of the United Kingdom representative at the 46th meeting of the Security Council. Sir Alexander Cadogan said that having invoked Chapter VI, however, the Sub-Committee recommended that the Member Governments of the United Nations should break off diplomatic relations with the Government of Spain. This was one of the so-called sanctions provided for in Chapter VII of the Charter. It was for that reason that his Government had

IV. *The Yalta Formula and the decisions of the Security Council*

The application of the Yalta Voting Formula[1] to the system of pacific settlement under Chapter VI has been touched upon, though incidentally, in respect of several important questions in the preceding parts of the present article. It is now proposed to discuss some specific problems connected with the application of Article 27 of the Charter to the decisions which the Security Council is empowered to take under Chapter VI. Two categories of cases may be envisaged: (i) where no permanent member is a party to a dispute, and (ii) where a permanent member is a party to a dispute.

i. *Where no permanent member is a party to a dispute.* It is unnecessary to reiterate that under both Article 27 of the Charter and the Joint Statement of the Sponsoring Governments, in cases where a permanent member is not a party to a dispute, the requirement of the unanimity of the permanent members is more rigid than in cases where a permanent member is a party to a dispute. Pursuant to paragraph 3 of Article 27, a permanent member who is a party to a dispute must abstain from voting. When the Joint Statement was being drafted by the delegations of the sponsoring Governments, main attention was concentrated upon the case where a permanent member is not a party to a dispute, for it was taken for granted that after the agreement at Yalta few questions would arise in cases where a permanent member is a party to a dispute. This emphasis was also motivated by the anxiety of the delegations of the sponsoring Governments to meet the attacks of the delegations of the middle and small Powers, who directed their principal criticism against the veto provision, in so far as it would apply in cases where a permanent member is not a party to a dispute.

The operative parts of the so-called 'chain of events' theory in the Joint Statement clearly envisage the case where no permanent member is a party to a dispute. According to this theory, whenever the Security Council passes beyond the stage of 'consideration and discussion', whenever it decides to make an investigation, whenever it determines whether a dispute or a situation is likely to endanger the maintenance of peace and security, or whenever it resolves to make recommendations to the parties or to other organs of the United Nations, its 'decisions and actions may

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very grave doubts as to the juridical reasoning of the Sub-Committee and the recommendations based upon that reasoning. See *Security Council Journal*, No. 39, p. 762.

[1] '1. Each member of the Security Council shall have one vote.

'2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

'3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VIII, Section A, a party to a dispute shall abstain from voting.'

The formula is in substance identical with Art. 27 of the Charter.

well have major political consequences and may even initiate a chain of events which might in the end require the Council under its responsibilities to invoke measures of enforcement'.[1] The justification for the requirement of unanimity of the permanent members rests upon the assumption that 'in view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred'.

The 'chain of events' theory has its logical basis in the assumption of the *possibility* of decisions leading to enforcement action, in the taking of which the concurrence of all the permanent members is necessary. This basis would be a sound one if it could be established that in the pacific settlement of disputes there exists a strong probability or an inevitability of the Security Council having to resort to enforcement action. But past lessons show that most procedures and methods of pacific settlement do not ordinarily entail the necessity of measures of enforcement. For the purpose of encouraging and promoting pacific settlement, a decision by the Security Council would carry weight even though it is not concurred in by all the permanent members. On the contrary, when the Security Council can reach no decision by reason of the veto, the deadlock would certainly have a prejudicial effect upon the settlement of a dispute.

The true explanation of the 'chain of events' theory lies in the fact that the hard-pressed delegations of the sponsoring Governments had to give in the circumstances an *ad hoc* reply to the questionnaires addressed to them by the middle and small Powers. They had to evolve a theory to justify the retention of the veto in cases where no permanent member is a party to a dispute, in order to preserve the integrity of the Yalta Formula.

ii. *Where a permanent member is a party to a dispute.* As referred to above, the implications of the Yalta Voting Formula in cases where a permanent member is a party to a dispute were not thoroughly examined either by the sponsoring Governments or by the middle and small Powers at San Francisco. This was because the agreement reached at the highest level among the United States, the United Kingdom, and the Soviet Union and later adhered to by China was welcomed with relief, as the agreement put an end to the deadlock which had prevailed since the end of the Dumbarton Oaks Conversations. The voting issue being the chief stumbling-block to the presentation by the great Powers of a complete set of blue-prints for the proposed world organization, its solution was regarded as a distinct and important gain—so much so that the formula acquired a sacrosanct character and was regarded as 'untouchable'. The sponsoring Governments were pledged, as it were, to defend it tooth and nail, and the other Powers, in the belief that this was already a major concession, did not devote to the proviso in Article 27, paragraph 3, the meticulous dissection and criticism which they applied to the provisions concerning cases where no permanent member is a party to a dispute.

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[1] Cf. Dr. Evatt's statement: 'This is true. But it is for this very reason that the exercise of a veto to block conciliation of disputants—even where both disputants seek conciliation—will prevent the dispute from being composed and will be more likely to cause serious consequences in the way of a breach of peace.' See *supra*, p. 341.

As a consequence, a few important questions were left unnoticed and unsolved in the drafting of the Charter, and these questions have since either provoked bitter controversy in the Security Council or given rise to uncertainties as to the interpretation and application of the requirement of abstention as contained in the proviso in Article 27, paragraph 3. These are examined below.

iii. *Distinction between disputes and situations.* In various provisions in Chapter VI, the words 'disputes' and 'situations' are used in close juxtaposition to each other. For instance, Article 35, paragraph 1, says: 'Any Member of the United Nations may bring any *dispute* or any *situation* of the nature referred to in Article 34 to the attention of the Security Council or of the General Assembly.' Article 34 provides: 'The Security Council may investigate any *dispute*, or any *situation* which might lead to international friction or give rise to a *dispute*. . . .' Article 36, paragraph 1, lays down as follows: 'The Security Council may, at any stage of a *dispute* of the nature referred to in Article 33 or of a *situation* of like nature, recommend appropriate procedures or methods of adjustment.' But in Chapter V, Article 27, paragraph 3, the term 'situation' is not used; the proviso in that paragraph reads: 'provided that, in decisions under Chapter VI and under paragraph 3 of Article 52, a party to a *dispute* shall abstain from voting.'

Were the words 'disputes' and 'situations' intended to be *termini technici* with distinct legal consequences appropriate to each? Apart from Article 35, paragraph 2,[1] and Article 38,[2] where in both provisions only the word 'dispute' is used and where the intention is perfectly clear, it would seem that different legal consequences also follow from the use of one or the other word in the following two cases:

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[1] 'A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any *dispute* to which it is a party, if it accepts in advance, for the purposes of the *dispute*, the obligations of pacific settlement provided in the present Charter.'

[2] 'Without prejudice to the provisions of Articles 33–37, the Security Council may, if all the parties to any *dispute* so request, make recommendations to the parties with a view to a pacific settlement of the *dispute*.' (Italics are the writer's.)

1. Under Article 32 of the Charter, the Security Council must invite any Member of the United Nations which is a party to a dispute under consideration by the Council to participate without vote in the discussion of that dispute. The Security Council is under no similar obligation with regard to a Member which brings a 'situation' before it or is concerned in a situation under consideration by the Council.
2. Under Article 36, the Security Council may recommend 'appropriate procedures or methods of adjustment' with regard to both disputes and situations, whereas under Article 37, paragraph 2, the Security Council may recommend 'terms of settlement' with regard to a dispute only, the implication being that it is given no such power with regard to situations.

The more important and more perplexing question is whether under Article 27, paragraph 3, according to which a party to a dispute shall abstain from voting, a party directly involved in a situation shall likewise abstain from voting. In case such a party is a permanent member, is it to be concluded that it shall abstain from voting and that its concurring vote is not necessary to a decision of the Security Council?

It would seem that the question whether the Security Council has before it a dispute or a situation is one which the Security Council alone is competent to decide. The Security Council is, of course, not bound to declare a matter to be a dispute simply because one party alleges it to be a dispute. Mr. van Kleffens put the question in a proper light when he said in the case concerning Greece:

> 'But since the answer to the question whether that matter is a dispute or a situation has consequences; consequences, namely, with regard to the voting procedure, I do not think that in the final analysis, it can be left to the parties to decide whether a matter is a dispute or a situation and that is a question that should be decided by the Council having heard the development of the parties' statements.'[1]

Mr. Makin, President of the Security Council, likewise said in the same case:

> 'The Council has not declared the matter to be a dispute, and at such time as the Council declares any situation to be a question of dispute, in that way it brings into operation Article 27 of the Charter.'[2]

It has been urged with a good deal of force that whether a matter is a dispute or a situation is a decision on a non-procedural matter within the meaning of Article 27, paragraph 3, of the Charter. As such, a decision would require an affirmative vote of seven members, including the concurring votes of all the permanent members.[1] After a decision is reached as to the existence of a dispute, an additional question may arise, which states are parties to a dispute? By the same token, this again would seem to call for a non-procedural decision subject to the concurring votes of all the permanent members. If no unanimity among the permanent members exists in either case, 'at this preliminary stage, the possibility of useful action by the Security Council might be foreclosed', as Professor Hudson puts it.[2]

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[1] *Security Council Journal*, No. 15, p. 270.

[2] Ibid., No. 8, p. 131. See also Mr. Vyshinsky's statement: 'I agree that it is not enough to say that because a party announces that a dispute exists the Council must agree that a dispute exists. It is for the Council in every case to determine itself whether or not a dispute exists.' Ibid., No. 15, p. 271.

The voting procedure as regards 'dispute' or 'situation' formed the subject of vehement controversy in the meetings of the Security Council in the case of Greece and in the Syria–Lebanon case. It was finally referred to the Committee of Experts of the Security Council, which met in March and April 1946 to study the Rules of Procedure of the Security Council, and to attempt to reach agreement on the questions involved. Little success attended the efforts of the Committee of Experts on this specific question. The writer, then Chairman of the Committee of Experts, submitted, as representative of the Chinese Government, a statement with a view to clarifying the application of the abstention requirement in Article 27, paragraph 3, to the decisions of the Security Council under Chapter VI of the Charter, in so far as the attempted distinction between disputes and situations is concerned. Relevant parts of this statement, which received considerable support from other members of the Committee, and which has not so far been published, are reproduced below:

> 'The Yalta Formula provides that when a state is party to a dispute it shall abstain from voting in the non-procedural decisions of the Council under Chapter VI of the Charter concerning such dispute. This requirement for abstention, in the case of a permanent member being a party to a dispute, obviously does not affect the requirement that the remaining permanent members must concur in the decisions.
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> 'It is also clear that the abstention requirement laid down in Article 27, paragraph 3, is not intended to apply to all matters arising under Article 35, paragraph 1. Thus when a state brings to the attention of the Security Council, by reason of the general interest of that state as a Member of the United Nations, a matter which it considers might endanger international peace and security, the requirement for abstention shall not apply to such Member in any of the decisions of the Council provided for in Article 34 and Article 36. In exercising such a general right, the position of the state bringing the matter to the attention of the Security Council is similar to that of the Secretary-General under Article 99.
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> 'With respect to the requirement for abstention, however, the distinction between

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[1] 'The question of whether a case constitutes a situation or a dispute is a question of substance and not of procedure and so any decision on such a question would have to be taken not under Paragraph 2 of Article 27, but under Paragraph 3 of Article 27.' Mr. Vyshinsky, ibid., No. 15, p. 273. He also referred to the 'decision taken at San Francisco on 7 June, 1945, in the discussion of a report of the Third Commission . . . that the decision regarding the preliminary question as to whether or not such a matter is procedural must be taken by a vote of seven members of the Security Council, including the concurring votes of the permanent members.'

[2] Op. cit., *supra*.

disputes and situations should not extend to those cases in which one state complains that its specific rights have been infringed upon or their enjoyment directly endangered by the action of one or more other states, and alleges that a dispute, the continuance of which endangers international peace and security, has arisen. Should the other state or states directly involved make the allegation that a situation has arisen as distinct from a dispute, such an attempted distinction shall not affect the requirement for abstention laid down in Article 27, paragraph 3, of the Charter.

'The specific function of the Security Council in connexion with the pacific settlement of disputes and situations endangering the maintenance of international peace and security is laid down in Article 36, which states that "The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment". The terms of this article indicate that the action contemplated is not based upon a prior determination whether a matter is a dispute or a situation, but upon whether the matter brought before the Council is of such a nature that its continuance is likely to endanger the maintenance of international peace and security. It is clear that Article 36 makes no distinction between disputes and situations in so far as the function of the Council in making recommendations is concerned.

'At the time of the Yalta Conference the authors of the voting formula had before them only the text of the Dumbarton Oaks Proposals. An examination of these proposals reveals that the paragraph corresponding to Article 36 (1) of the Charter, namely Chapter VIII, Section A, paragraph 5, refers only to disputes and not to situations. In embodying the abstention clause into the voting formula, therefore, it was clearly the intention of the authors to exclude from voting those states involved directly in a matter whose continuance might endanger international peace and security. However, as the term used to describe such matters was "dispute" in the text of the Dumbarton Oaks Proposals, it was only logical that the term used in the Yalta Formula was "parties to a dispute". There is further evidence of the fact that the term "parties to a dispute" was meant to include "parties directly concerned in a situation" in cases where the Security Council has to make the determination provided for in Article 34 of the Charter. In a statement issued on 5 March 1945 Mr. Stettinius, then Secretary of State said: "This means that no nation, large or small, if a party to a dispute, would participate in the decisions of the Security Council on questions like the following: '(b) Whether the dispute or situation is of such a nature that its continuation is likely to threaten the peace.' "

'As stated above, the text of the Yalta Formula was drafted on the basis of the text of the Dumbarton Oaks Proposals in which the term "situation" did not appear in connexion with the specific function of the Council relative to pacific settlement, as laid down in Chapter VIII, Section A, paragraph 5. At San Francisco this section of the Dumbarton Oaks Proposals was considerably revised while the text of the Yalta Formula remained untouched. Among the many modifications made in Section A of Chapter VIII was the insertion of the term "or of a situation of like nature" in paragraph 5 of that section. The Summary Report of the Twelfth Meeting of Committee III/2 reveals that the words "or of a situation of like nature" were intended to give effect to the Australian amendment which proposed that the Security Council should be permitted to deal with both a dispute or a situation the continuance of which was likely to endanger the peace. Thus it is clear that the insertion of the term "or of a situation of like nature" in Article 36 with reference to the specific function of the Security Council as regards pacific settlement, was never intended to be the basis of a differentiation between the duty of states to abstain from voting in a dispute to

> which they are parties and the absence of such a duty in the case of situations in which they are directly concerned.
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> 'The abstention clause in Article 27 (3) of the Charter is an embodiment of the principle that, so far as the process of pacific settlement calls for the appreciation by the Council of a question presented to it, a state shall not at once be judge and party in its own cause. If a matter brought to the attention of the Council is sufficiently grave so that the Council considers that its continuance may endanger international peace and security, it may make such a decision exclusive of the votes of the states directly involved. If this decision is in the affirmative, the Security Council may recommend appropriate procedure or methods of adjustment by virtue of a decision which is again exclusive of the votes of the states directly involved. This requirement for abstention, however, does not flow from the fact that the states directly involved are parties to a dispute as distinct from being directly involved in a situation. Rather it is derived from the necessity for effective action on the part of the Council on the one hand, and the principle that no state shall be judge and party in its own cause on the other.
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> 'If the interpretation is accepted that, with respect to the requirement for abstention, a distinction exists between parties to a dispute and parties directly concerned in a situation, then when a matter is brought to the attention of the Security Council involving a permanent member, that matter can never be considered a dispute within the meaning of the Charter, unless that permanent member chooses to have it so considered. Furthermore, to make the determination of whether a dispute or situation exists subject to the veto power of a permanent member is to defeat the clear intention of the Yalta Formula and to render meaningless the distinction made therein between voting procedures applicable to pacific settlement and voting procedures applicable to enforcement action.'

In the above statement an attempt is made to distinguish two types of situations which, it is believed, are envisaged in the Charter. Situations of the first type are those in which all Members of the United Nations have a general interest, that is to say, the interest in the maintenance of international peace and security. These situations are similar to those envisaged in Article 11, paragraph 2, of the Covenant, in which 'it is declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends'. They are also similar to 'the international conditions whose continuance might endanger the peace of the world', as provided in Article 19 of the Covenant. The authors of the Dumbarton Oaks Proposals and of the Charter probably had Article 11 and Article 19 in mind when they inserted the word 'situation' in the text of Chapter VIII, Section A, of the Dumbarton Oaks Proposals and of Chapter VI of the Charter. It is not unreasonable to argue that the requirement for abstention should not apply in decisions in regard to this type of situations. A Member state, availing itself of the right under Article 35 to bring the situation to the attention of the Security Council, should not lose its right to vote by being involuntarily made a party to a 'dispute', in case it is a member of the Security Council. Otherwise, the salutary principle embodied in Article 35, namely, the principle that any circumstance, condition, or situation in any part of the world is the concern of all the Member states, would be nullified, as the Member which avails itself of this right would, in so doing, run the risk of being deprived of its vote. This would, therefore, amount to a general discouragement to exercise this 'friendly right', as the phrase was used in Article 11 of the Covenant, and presumably implied in Article 35 of the Charter.

It is submitted that the conclusion would be different in regard to situations of the second type. Situations of the second type are those which are to all intents and purposes indistinguishable from disputes in the strict sense of the word. For instance, the Iranian Government, in its note of 19 January 1946, called the attention of the Security Council to the 'situation' produced by the interference of the Soviet Union in Iran, a situation 'which might lead to international friction'. It is believed that though the situation was labelled as such, it had all the characteristics of a dispute, and it would be open to the Security Council to decide that, pursuant to the abstention requirement under Article 27, paragraph 3, the parties directly involved in the 'situation' should abstain from voting, for the reason that the intention of the Yalta Voting Formula was that no one should be judge in his own cause.

Doubts have been expressed as to whether the general principle of law, 'no one should be judge in his own cause', can be applied in cases before the Security Council. It has been urged that the Security Council is not a tribunal and it is not circumscribed by the fundamental limitations of the judicial process. It is believed that though the Security Council in the settlement of disputes would normally lay primary emphasis on its conciliatory functions, the quasi-judicial function of pronouncing upon the merits of a dispute is equally implicit in its powers. Commentators on Article 15, paragraph 7, of the League Covenant have not hesitated to point out that, in not a few cases, the League Council acted in a quasi-judicial capacity.[1] The negotiations at Dumbarton Oaks, the United States proposal on the voting formula, and the statements made after the Yalta Conference[2] all justify the conclusion that the abstention requirement in paragraph 3 of the formula is derived from the principle of justice that no state shall be a judge and party in its own cause.

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[1] See, generally, Schücking und Wehberg, *Die Satzung des Völkerbundes*, 3rd ed., vol. i, pp. 512–16. See also Fischer Williams, 'The League of Nations and Unanimity', *Chapters on Current International Law and the League of Nations* (1929), pp. 437–8.

[2] For example, statement issued by the State Department of the United States, *Department of State Bulletin*, 11 March 1945, in which it was stated that 'there are three types of matters on which the Security Council may vote: (1) procedural, (2) quasi-judicial, and (3) political'.

The question has also been raised as to whether *travaux préparatoires* should be resorted to in the interpretation of the word 'dispute' in Article 27, paragraph 3, on the ground that, where the text is clear, preparatory work as a help to interpretation should be excluded and that on this specific question the text is sufficiently clear in that it contains only the word 'dispute', and not situations, though they may have all the characteristics of a dispute. It may be answered that while Article 27, paragraph 3, may be clear by itself, it is not clear when read together with the provisions of Chapter VI. In any interpretation of Article 27, paragraph 3, it is necessary to read it in the light of Chapter VI, since the application of the requirement of abstention refers exclusively to decisions under Chapter VI. A close examination of Article 27, paragraph 3, in relation to the provisions of Chapter VI, reveals serious doubts as to whether the word 'dispute' was used as a *terminus technicus* and whether the scope of the requirement for abstention was intentionally limited to 'dispute' in the strict sense. Consequently, resort to *travaux préparatoires* becomes almost imperative in order to discover the intention of the parties.[1]

A more thoroughgoing approach to this difficult problem has also been suggested. It is proposed that there should be a definition of a 'dispute' for the purposes of the abstention proviso in Article 27, paragraph 3. Disputes would be defined as the differences resulting from the allegations by one party which are controverted by another. No doubt the purpose of such a definition is to have the Security Council pronounce a judgment on the charges made by one party against another—a frequent phenomenon in recent practice. It is open to doubt whether such a definition is helpful. A definition as sweeping as this would have the result of provoking numerous sharp issues, upon which the Security Council would have to decide, in the course of a single meeting of the Security Council. It is submitted that the term 'dispute' as used in the Charter connotes something more than a mere difference resulting from charges and countercharges. It would be indeed unfortunate for the Security Council to take decisions by voting as often as a member wishes to be vindicated from a verbal accusation. It is believed that 'dispute' as used in the Charter, like the same word used in the Covenant, must be one which arises out of either a 'claim of right' or a 'claim of interest'; it must be a '*pre-existing difference*, certainly in the sense and to the extent that the Government which professes to have been aggrieved should have stated its claims and the grounds on which they rest and that the other Government should have had an opportunity to reply, and if it rejects the demands, to give its reasons for so doing.'[2]

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[1] See Lauterpacht in *Harvard Law Review*, 48 (1935), particularly pp. 571–3.

[2] Judge Moore dissenting in the *Mavrommatis* case, *P.C.I.J.*, Series A, No. 2, p. 61. Italics are the writer's.

V. *The requirement for abstention regarding* (1) *Request for Advisory Opinion;* (2) *Domestic Jurisdiction clause;* (3) *Recommendations under Chapter VII, Article 39*

1. *Request for Advisory Opinion.* There is some uncertainty as to whether a party to a dispute should abstain from voting in a decision by the Security Council to request the International Court of Justice to give an advisory opinion in connexion with a dispute or a situation which is under consideration by the Security Council. In case a permanent member is a party to a dispute, shall it abstain from voting or can it exercise a veto over such a decision? It may be contended that since Article 27, paragraph 3, provides that in decisions under Chapter VI and under paragraph 3 of Article 52 a party to a dispute shall abstain from voting, a request for an advisory opinion is not such a decision because the provision for a request for advisory opinion is found in Chapter XIV, Article 96, paragraph 1. In the context of the Joint Statement of the Sponsoring Governments, a request for advisory opinion is apparently to be considered as a non-procedural matter, in spite of the well-known divergence of views—during the existence of the League of Nations—regarding the question whether a request for advisory opinion is a matter of procedure or a matter of substance.[1]

It will be recalled, however, that the request for advisory opinion was provided for in the Dumbarton Oaks Proposals under Chapter VIII, Section A, paragraph 6: 'Justiciable disputes should normally be referred to the International Court of Justice. The Security Council should be empowered to refer to the Court, for advice, legal questions connected with other disputes.' At San Francisco the provision concerning the request for advisory opinion was transferred, entirely for reasons of drafting, to Chapter XIV under the title 'The International Court of Justice'. No corresponding change was made in Article 27. If it had not been transferred, it would have been perfectly clear that the request for advisory opinion would be a decision under Chapter VI on pacific settlement and a party to a dispute should abstain from voting. It is difficult to deny that the transposition raises a doubt as to whether the request for advisory opinion remains a decision by the Security Council under Chapter VI, if the Security Council decides to make such a request in connexion with a matter brought before it under one of the articles in Chapter VI.

The correct view, it is submitted, is that the transposition of this provision does not in principle affect the requirement for abstention under the Yalta Voting Formula. In many cases the decision on the request for an advisory opinion will be incidental to other decisions under Chapter VI, and it will be difficult to sustain the view that while in the principal decision abstention is required, such abstention is not required in a subsidiary decision. When, however, the request for an advisory opinion calls for an answer which would be 'equivalent to deciding the disputes between the parties'[1] or, as has been put in another way, would 'have a closer resemblance to declaratory judgments in national law than to the advisory opinions of national law',[2] then it is arguable that it may have to be treated as an independent decision. It is not likely that a permanent member, a party to a dispute, will evince a readiness to abstain from voting in a decision to request an advisory opinion in this sense. On the contrary, it will in all likelihood insist that compulsory jurisdiction cannot be allowed 'to creep in under the cover of the Council's power to request an advisory opinion'.[3]

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[1] Hudson, *The Permanent Court of International Justice* (1943), pp. 505–8; Schücking und Wehberg, op. cit., pp. 518–20; Ray, op. cit., pp. 233–6; Engel, *Art. 5 und Art. 14 Satz 3 der Völkerbundsatzung* (1936), *passim.*

2. *Domestic jurisdiction clause.* The same question arises in connexion with the so-called domestic jurisdiction clause. This clause was originally found in the Dumbarton Oaks Proposals under Chapter VIII, Section A, paragraph 7, in the following language: 'The provisions of paragraphs 1 to 6 of Section A should not apply to situations or disputes arising out of matters which by international law are solely within the domestic jurisdiction of the State concerned.' This formulation follows roughly the language of Article 15, paragraph 8, of the Covenant. Though the Covenant provided that the Council was to decide whether a dispute arose out of 'a matter which by international law is solely within the domestic jurisdiction of a state', the corresponding provision in the Dumbarton Oaks Proposals did not mention explicitly that the Security Council was to be the organ to make this decision. The omission, it is believed, cannot, however, justify the conclusion that each state is competent to determine for itself whether a matter by international law is solely within the domestic jurisdiction of that state. It is more reasonable to assume that it was implicit in the provision in the Dumbarton Oaks Proposals that the Security Council has the power to make the decision.

At San Francisco certain changes were introduced into the Dumbarton Oaks text. The word 'solely' was changed to 'essentially' and the phrase 'by international law' was deleted. At the suggestion of the sponsoring Governments at the beginning of the San Francisco Conference, the whole provision was taken out of Chapter VIII, Section A, of the Dumbarton Oaks Proposals (Chapter VI of the Charter) and put into Chapter I (Purposes and Principles), and it was referred to the Technical Committee on

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[1] The *Eastern Carelia* case, *P.C.I.J.*, Series B, No. 5, p. 29; see also Conwell-Evans, *The League Council in Action* (1931), p. 175.

[2] Goodrich in *American Journal of International Law*, 32 (1938), p. 756: 'In certain respects, the great majority of advisory opinions of the Permanent Court have a closer resemblance to the declaratory judgments of national law than to the advisory opinions of national law.'

[3] McNair in this *Year Book*, 7 (1926), p. 12.

Purposes and Principles (Committee I/1). After the adoption of the present text, no corresponding change was made in Article 27.

It is submitted that, like the provision on the request for advisory opinion, the transposition of the domestic jurisdiction clause—even though in this case it was done for reasons of substance and not merely for reasons of drafting—does not affect in principle the requirement for abstention by a party to a dispute in a decision by the Security Council under Chapter VI. If the question whether a matter is essentially within the domestic jurisdiction of a state is raised in connexion with a dispute or situation under consideration by the Security Council pursuant to the provisions of Chapter VI, the Security Council is competent to decide upon this question and the decision is to be taken exclusive of the votes of the parties to the dispute. It is, however, possible that this question might be raised, in connexion with a dispute or a situation, as a preliminary question the decision of which, it may be argued, is necessary before the Security Council can proceed with the exercise of its powers of pacific settlement under Chapter VI. In this event, the decision could be justified as an independent decision falling under Chapter I, Article 2, paragraph 7, and not under Chapter VI, in which case the requirement for abstention would not apply. If a permanent member is a party to a dispute and claims that the matter is essentially within its domestic jurisdiction, a deadlock may arise which may prevent a decision and, in consequence, the application of Chapter VI of the Charter.

3. *Recommendations under Chapter VII, Article 39.* Article 39 of Chapter VII provides: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and *shall make recommendations*,[1] or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.' It was thought at San Francisco that the corresponding article[2] in the Dumbarton Oaks Proposals was too rigid in that it would imply that a determination of the existence of any threat to the peace, breach of the peace, or act of aggression was mandatory upon the failure to settle a dispute by pacific means. The modification introduced was intended to allow more flexibility of decision or action by the Security Council.

In the course of the discussion in the Technical Committee (Committee III/e) doubts were expressed as to the use of the phrase 'shall make recommendations' which appeared in the Dumbarton Oaks text, and as to whether the recommendations under Chapter VII, Article 39, of the Charter would not be a duplication of the recommendations under Chapter VI. The Committee finally decided unanimously to include in its final report the observations made by the Belgian delegate. The gist of these observations was that in using the word 'recommendations' in Article 39 of Chapter VII the Committee had intended to show that the action of the Security Council, so far as it relates to the peaceful settlement of a dispute or to situations giving rise to a threat of war, a breach of the peace, or aggression, should be considered as governed by the provisions contained in Chapter VI: 'Under such a hypothesis, the Council would in reality pursue simultaneously two distinct actions, one having for its object the settlement of the dispute or the difficulty, and the other, the enforcement or provisional measures, each of which is governed by an appropriate section in Chapter VIII'[1] of the Dumbarton Oaks Proposals.

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[1] Italics are the writer's.

[2] Chapter VIII, Section B, paragraph 1, read as follows: '1. Should the Security Council deem that a failure to settle a dispute in accordance with its recommendations made under paragraph 5 of Section A, constitutes a threat to the maintenance of international peace and security, it should take any measures necessary for the maintenance of international peace and security in accordance with the purposes and principles of the Organization.'

According to this interpretation by the Technical Committee, the recommendations of the Security Council under Article 39 are to be made in connexion with its efforts to achieve a pacific settlement under Chapter VI and these efforts will presumably continue even during a period after the enforcement measures provided for in Articles 41 and 42 have been decided upon.[2] In making recommendations under Article 39, therefore, the Security Council takes its decision in point of fact under Chapter VI. On this reasoning, it would seem that the abstention requirement contained in Article 27, paragraph 3, would apply in decisions by the Security Council to make recommendations under Article 39, and that a party to a dispute ought to abstain from voting in the same way as it ought to abstain in decisions under Chapter VI.

VI. *The question of voluntary abstention*

There is nothing either in the Charter or in the Joint Statement of the Sponsoring Governments to indicate whether voluntary abstention by a permanent member of the Security Council, that is, abstention not required by Article 27, paragraph 3, should or should not be counted, in non-procedural decisions, as a negative vote. No provision is made in the Rules of Procedure of the Security Council on this point similar to paragraph 3 of Article IX of the Rules of Procedure of the League Council[3] adopted in 1933. While it is acknowledged that abstention under Article 27, paragraph 3, does not prevent unanimity from being secured, it is not certain that voluntary abstention by one of the permanent members is compatible with the literal language of Article 27, paragraph 3, namely, 'Decisions of the Security Council on all other matters shall be made by an *affirmative* vote of seven members including the *concurring* votes of the permanent members. . . .'[1]

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[1] Report of the Rapporteur, of Committee III/3, Doc. 881, III/3.46, p. 6: *U.N.C.I.O. Documents*, vol. xii, p. 507.

[2] Goodrich and Hambro, op. cit., p. 158.

[3] 'Subject to the provisions of Article 10 of the present rules, each member of the Council shall be called upon separately to vote, if a member of the Council so requires. In counting the votes, abstentions from voting shall be disregarded' (*League of Nations Document*, C. 393, M. 200, 1933, V).

In the consultations among delegations of the sponsoring Governments and France at San Francisco a strict view was taken of this requirement, and the agreement reached among these delegations was that the concurrence of the five permanent members should take the form of affirmative votes of all of them in favour of the decision. This agreement was not, however, put down in writing, nor was it ever communicated to the other delegations at San Francisco.

The first case of a permanent member abstaining voluntarily from voting occurred in the Security Council on 2 May 1946, in connexion with a draft resolution proposed by Australia to appoint a sub-committee to study and report on the Spanish question. The Soviet representative, Mr. Gromyko, expressed dissatisfaction with the proposal on the ground that it would cause delay and inaction and stated that 'the Soviet delegation continues in its strongly negative attitude toward the draft resolution'. He abstained from voting, however, and explained his position as follows:

> '. . . bearing in mind in this connection that my voting against the Australian draft resolution would make its adoption impossible, I abstain from voting. I consider it necessary to draw the attention of the Security Council to the fact that my abstention from voting on this matter may in no way be regarded as a precedent capable of influencing in any way the question of the abstention of permanent members of the Security Council.'[2]

The United States representative, Mr. Stettinius, also made a statement to the effect that he reserved the position of the United States on the statement of Mr. Gromyko and that with that understanding he was prepared to agree that Mr. Gromyko's abstention should not create a precedent for the future.[3] The draft resolution was finally adopted by ten votes with one abstention.

In connexion with the Australian draft resolution, it was not altogether clear whether the sub-committee was proposed for the purpose of investigating a situation within the meaning of Article 34 or was conceived simply as 'a subsidiary organ' of the Security Council which may be established under Article 29. The draft resolution left this question in doubt. The word 'investigate' was carefully avoided, and no article of the Charter was cited in the text of the draft resolution. Assuming that the sub-committee was to be created to conduct an investigation, the decision of the Security Council on the appointment of the sub-committee would be a non-procedural one, and the abstention by one permanent member would, according to the tacit agreement among the five permanent members at San Francisco, be a negative vote and would prevent a decision by the Security Council.[1] On the other hand, assuming that the sub-committee to be appointed was conceived as one of such subsidiary organs as the Security Council may deem necessary to establish for the performance of its functions (Art. 29), the decision would be on a procedural matter, and the question of the abstention by a permanent member would not come into play at all in the decision, as this would be a decision under paragraph 2 of Article 27 instead of under paragraph 3.

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[1] Italics are the writer's.

[2] *Security Council Journal*, No. 32, p. 627.

[3] Ibid., p. 628.

In spite of the uncertainty of the legal consequences of the abstention of the Soviet representative in the Spanish question, there is reason to believe that, in the practice of the Security Council, abstentions by permanent members will not be counted as negative votes, just as before the adoption of Article 9 of the Rules of Procedure by the League Council in 1933 the practice was to disregard, in the counting of votes, abstentions from voting.[2] This development will probably be based upon the theory that a permanent member who has the opportunity to exercise its veto power but chooses to refrain from exercising it should not be obliged to have its abstention counted as a negative vote—a development which may be accepted by the permanent members themselves as a means to mitigate the rigours of the 'veto'.

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[1] Cf. statement by Senator Tom Connally, Chairman of Senate Committee on Foreign Relations: 'I apprehend that there may be some question about the proviso in which a member of the Security Council, if it is a party to the dispute, does not vote, and the other clause that there shall be five permanent members vote before positive action can be taken. The construction of that paragraph was that this proviso is an exception to the general rule, and where a party to the dispute is a member of the Security Council, that there are then only four permanent members of the Security Council, excluding the party to the dispute, that vote; in that case the votes of any other three non-permanent members can be counted to make up the number of seven. *In all other cases, however, the votes of five permanent members are required.*' *Hearings*, p. 265. (Italics are the writer's.)

[2] See Ray, op. cit., p. 228; and Stone in this *Year Book*, 27 (1933), pp. 31–3.

STATE SUCCESSION IN THE MATTER OF TREATIES

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THE object of this article is to consider the cases in which one state, which has replaced another in possession of given territory, is bound by, or entitled to the benefit of, treaties concluded by its predecessor. The question has arisen recently in connexion with India, Pakistan, Burma, and Ceylon, and special provisions, which will be dealt with below, were made on the point.

State succession in general is a thorny subject, and one on which the literature of international law offers divided, and somewhat confusing, counsel. Before proceeding, therefore, to discuss such practice as exists, and the particular cases mentioned above, it will be well to clear the ground by setting forth some general considerations mainly of an analytical nature. Much of the uncertainty which surrounds the subject of state succession arises from a failure to define terms with adequate precision. The very phrase itself is apt to lead one astray. 'State succession' may be used in two senses (*a*) denoting succession in fact, and (*b*) denoting succession in law. Succession in fact takes place when one state follows another in possession of territory. Succession in law is the juridical substitution in such circumstances of the successor state for its predecessor. As regards the latter, some writers identify succession with the Roman law conception of it as found in the time of Justinian, that is the succession of an heir to the deceased. There is no difficulty in showing that in this sense succession does not apply to the relations of states, and some writers dismiss, therefore, the whole conception from international law. Other writers, taking a broader view, do not limit their conclusion by defining their premiss so rigidly, but take the problem to be whether, when one International Person 'succeeds' another, there is a legal substitution, in some or all respects, of the new Person for the old in regard to the predecessor's rights and duties. Even those who do this, however, are apt to be obsessed with the legal idea of succession as such. Writers, in short, do not adequately distinguish between the two meanings of succession, and fail to make it clear that what they are discussing is succession in law; nor do they all sufficiently distinguish between the different types of succession which may take place in fact. Thus Oppenheim[1] starts off by purporting to state 'common doctrine'. He defines succession as follows:

> 'A succession of International Persons occurs when one or more International

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[1] *International Law*, vol. i (6th ed. by Lauterpacht, 1947), p. 151.

Persons take the place of another International Person, in consequence of certain changes in the latter's position.'

This is an admirable definition of what occurs in fact, but it is not 'doctrine'.[1] He then proceeds to distinguish between 'universal succession' and 'partial succession', and it is apparent that here, too, he is speaking of situations of fact. He then says: 'Several writers contest the common doctrine and maintain that a succession of International Persons never takes place.' His thought is here lacking in clarity, for he has not clearly distinguished (nor do the writers of whom he speaks distinguish) precisely between changes amounting to succession in fact, and succession in law. It seems that what the writers to whom he refers are trying to prove is that there is no succession in law, but they tend to dwell unduly on the abstract conception of succession (especially as found in Roman law) and much of what they say turns on the legal implications of the word itself. The practical issue is how far a successor in fact is bound (or entitled) in law under the treaties and semi-contractual obligations (concessions, debts, &c.) of the predecessor. In spite of the title of this article, which limits the subject to treaties, state succession hardly arises in any other connexion than treaties and similar contractual engagements, for it is universally agreed that there is no liability on the part of a successor state for the torts of its predecessor.[2] It is also agreed that there is succession to public property, &c., of the predecessor state—it could hardly be otherwise—as there is no alternative.

The cases in which there is succession in fact are as follows:

1. Cession.
2. Annexation.
3. Fusion with another state.
4. Entry into a federal union.
5. Dismemberment or partition.
6. Separation or secession.

It cannot be assumed that the same rule of law applies to all these situations of fact, or that there is any general principle of succession in law which applies to all of them. In case 1 we have an already existing state parting, voluntarily, with some but not all, of its territory. In case 2 there is either the extinction of a state, or a parting with some of its territory—in both cases involuntary. In 3 and 4 a state merges itself into a greater unity. In cases 5 and 6, on the other hand, an entirely new state comes into being, either by acquiescence of the parent state (case 5), or without it (case 6). The only common factor in all six cases is that, in greater or lesser, degree there is a succession in fact by one state (new or old) to territory belonging to another state.

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[1] Yet Oppenheim later on, in section 81, clearly appreciates this, for he speaks there of 'the very fact of one International Person following another in possession of State territory'.

[2] Servitudes are not a real exception, for in practice they can but rarely arise except under a treaty and it is not in virtue of 'succession' that they pass (if at all) but by reason of some principle imparting permanency to the treaty stipulation irrespective of any transfers of the territory involved. See below, p. 361. It is noteworthy that Sir Arnold McNair, in his *Law of Treaties* (1938), pp. 389 ff., deals with the subject of this article under the rubric 'Changed conditions affecting the political status of a contracting party', and does not even mention the doctrine of state succession.

The next step is to examine what has happened in concrete instances where these situations of fact have arisen.

II. *International practice*

Before proceeding to analyse the cases it is necessary to preface the discussion by pointing out that real obligations created by treaty 'run with the land', and bind the territory, so that any state succeeding to possession of the territory continues to be bound by them. Subject to this exception (if it be an exception—a question we can lay aside for the moment) there is no succession to treaties in cases 1 and 2. In cases 3 and 4 the original contracting party either survives, or is extinguished, in circumstances analogous to cases 1 and 2, and in which the same principle applies. In cases 5 and 6 the disruption is either violent, or by agreement, and the 'succession in law', if it takes place, does so by agreement, express or implied. (It is likely, in these circumstances, that the expression 'State Succession' does not correctly define the legal situation, so far as treaties are concerned, but this article is not dedicated to the reform of terminology.)

Cession and annexation

The evidence set out in Sir Arnold McNair's *Law of Treaties* (1938),[1] and by other writers, makes it clear that there is no distinction between these two cases in practice. The treaties of a state which is annexed, or ceded, in whole or in part, are, according to a practice which is so consistent and extends over so long a period as to raise an irresistible presumption of law, regarded as abrogated automatically in relation to the area ceded or annexed.

This was the view taken both by the United Kingdom and by the United States as to the effect of the annexation of Algiers by France in 1831. It was also the view taken by the United Kingdom when, in 1885, Upper Burma, and, in 1901, the South African Republic were annexed by Great Britain. The United Kingdom also held this view when Korea was annexed by Japan in 1910. The United States took the same view regarding the annexation of Hanover, Frankfurt, and Nassau to Prussia, of the

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[1] See pp. 389–411, 444–7. References to the examples which follow of cases (1) and (2) will be found either there or in Keith, *Theory of State Succession* (1907), chap. iv, and Hyde in *American Journal of International Law*, 26 (1932), p. 133. There is valuable material on the whole subject in Crandall, *Treaties, Their Making and Enforcement* (1916), pp. 425–39.

Italian States to Italy, of the South African Republic to Great Britain, of Korea to Japan, and Madagascar to France. In some cases, as in those of the annexations of Texas, Hawaii, and Madagascar, there were protests by third states which had treaties with the annexed states.

It appears, however, that for a time the United States held its treaties with the two Sicilies and Sardinia to be in force, notwithstanding the annexation of these states by Sardinia and Italy respectively, but that ultimately it abandoned that position.

When Tripoli was annexed by Italy, after the Turco-Italian War, the Treaty of Lausanne (1912) provided that Italy should take over a part of the public debt, but nothing was said regarding the treaty obligations of Turkey in so far as they applied to Tripoli. The United States seems to have been prepared in 1925 to put on record that its treaty with Tripoli of 1805 was extinguished by the annexation of that country by Italy in 1912. Great Britain recognized that the effect of the Italian annexation of Tripoli and Cyrenaica in 1912 was to extinguish the Capitulations formerly existing between Turkey and the other Powers in regard to those territories. The British Government also accepted the view that, when the Sulu Islands were ceded by Spain to the United States, the treaties of Spain regarding trade with those islands came to an end, and, when Germany acquired by cession in 1888 territory belonging to the Sultan of Zanzibar, Great Britain did not dispute the German contention that as a result the Sultan's treaties no longer affected that territory.

When German territory was ceded to other states, at the end of the 1914–18 war, the Treaty of Versailles laid down rules regarding the assumption by these states of a portion of the pre-war debt of the German Empire and also of the pre-war debt of the German State to which the territory belonged. Nothing was said about the treaty obligations applying to these territories, and no question of their application and assumption by the cessionary Powers appears to have been raised.

On the other hand, treaties of the annexing or cessionary state apply prima facie to the new territories acquired by it.

Fusion with another state and entry into a Federal Union

These two cases may also be taken together; indeed, the commonest case of fusion is entry into a federal union. There are, in fact, five possible cases of fusion, as follows:

(*a*) A complete fusion by which a new state is created and the old states disappear. This is theoretically possible, but does not appear to have occurred often in practice, owing to the fact that normally one of the combining states is regarded as continuing to exist, the union being treated as simply an enlargement of that state.

(*b*) A fusion of two states in which one of the combining states occupies a predominant position, and does not lose its identity by the fusion, but, in effect, acquires fresh territory as a result of a territorial resettlement. An example of this type of case was the creation of Yugoslavia, which resulted from the fusion of Serbia with Croat and Slovene minorities of the dissolved Austro-Hungarian monarchy. This was not treated as a new state but as an enlarged Serbia (unlike Poland and Czechoslovakia).

(*c*) Cases where there is a fusion which commonly takes the form of a Real or Personal Union, and in which the status of the combining states as International Persons is retained.

(*d*) Confederations of states.

(*e*) Federal Union.

An example of case (*a*) appears to have arisen when the United Netherlands was created by the Congress of Vienna in 1815. The Belgic, and certain other, provinces were joined to the United Netherlands and the whole designated as the Kingdom of the Netherlands. The state thus formed, though in general considered the successor to, differed in name, territory, and form of government, from, the state which entered into the Treaty of 8 October 1782 with the United States. In the period after 1815 the Government of the Netherlands adopted the attitude that the treaty was no longer in force, and ultimately the United States accepted that position.[1] *Sed quaere* whether this was not really a fusion of two states, such as invariably, perhaps always, produces situation (*b*), i.e. a case of an enlargement of an existing state—in which case the view taken was wrong.

Examples of case (*b*) are those of Prussia merging into the German Empire, and Serbia merging into Yugoslavia. In these cases it was held that what had happened was that Prussia and Serbia had simply enlarged their territory. In 1918 Serbia became fused with the Croat and Slovene minorities of the dissolved Austro-Hungarian monarchy in order to form Yugoslavia. Provision was made, in Article 12 of the Treaty between the principal Allied and Associated Powers and the Serb-Croat-Slovene State, signed at St. Germain on 10 September 1919, as follows:

> 'Pending the conclusion of new treaties or conventions all treaties, conventions, agreements and obligations between Serbia, on the one hand, and any of the Principal Allied and Associated Powers, on the other hand, which were in force on the 1st August, 1914, or which have since been entered into, shall *ipso facto* be binding on the Serb-Croat-Slovene State.'

The Yugoslav Government informed the United States that it considered treaties made by Serbia with the United States as applicable to the whole territory of Yugoslavia.[1] The case was one in which territory was ceded and became subject to the treaty system of the acquiring state.

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[1] Crandall, op. cit., p. 429.

Another example of fusion was when Prussia became incorporated in the German Empire. The United States held the view that the treaties of Prussia applied to relations between the United States and the German Empire. The German Government concurred in this opinion.[2] The case was one of enlargement. The German Empire was merely Prussia enlarged. It is true that certain treaties made by the United States with other German States, such as Bavaria, Saxony, and Württemberg, were treated by the American Courts as being still in force;[3] but it must be remembered that before the First World War[4] the member states of the Federal State of Germany retained their right to send and receive diplomatic envoys, and even a limited power of making international agreements with foreign Powers.

The fusion may, however, not be complete; that is to say, the identity of the states involved in the fusion may not be extinguished, so as to bring a new state into being, but may be such that they are preserved as International Persons, more or less. This was the case of Sweden and Norway, Austria and Hungary, Iceland and Denmark until, in the fullness of time, all these Unions (whether 'Real' or 'Personal') were dissolved. These are examples of case (*c*) above. The Act of Union between Iceland and Denmark in 1918 declared the members of the Union to be sovereign states. The United Kingdom Government took the view that pre-Union treaties which bound Iceland continued to bind her.[5] It is believed that the same view would be taken of treaties made by Denmark before the Union, as the international personality of Denmark remained the same throughout.

A closer union may be formed by a Confederation of States or a federal union—which is the point at which the international personality of the members tends to disappear by the complete absorption of one state by another. Entry into a federal union may take the latter form, in which case the position is indistinguishable from annexation, and the former state has completely lost its international existence. This was the case of most of the states (Texas, &c.) which joined the American Union, and it was never denied that their treaties were extinguished. The Law Officers of the Crown so advised in the case of Texas.[6] Cases might arise of entry into confederations or federal unions of a special type where the member states retain some treaty-making capacity (the Peru-Bolivia Confederation and the case of the Greater Republic of Central America, cited by Crandall).[1] It would appear that their treaties survive unless there is some understanding by which third states acquiesce in their abrogation.

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[1] Hackworth, *Digest of International Law*, vol. v (1943), p. 374. Having regard to the terms of the treaty such a communication appears to have been unnecessary. Oddly enough, there is no reference in Hackworth to the treaty provision.

[2] Ibid., p. 375.

[3] Crandall, op. cit., p. 433.

[4] Oppenheim, *International Law*, vol. i (6th ed. by Lauterpacht, 1947), p. 167.

[5] Although they were made by Denmark for the territory of Iceland, the latter not being a sovereign state until 1918. See McNair, op. cit., p. 434.

[6] McNair, op. cit., p. 393. But the treaties of the United States applied to Texas: Crandall, op. cit., p. 429.

The principle in these cases is that if the 'fusing' state retains its International Personality its treaties survive; if it does not retain its personality the position is the same as if it were annexed, and it becomes subject to the treaty system of the annexing state.

Dismemberment and secession

These cases are numerous in practice. A new state or a number of new states spring out of one 'old' one. Here again it is convenient to classify:

(*a*) *A new state is formed by secession from the mother-country*

The obvious historical example is that of the United States of America. It was never contended that the treaties made by Great Britain, even in so far as they related specifically to the American colonies, applied to the United States.[2] Lord Clarendon in 1854 stated that Mexico did not succeed *ipso jure* to conventions made with Spain but only by special agreement.[3] The Solicitor to the American Department of State advised in 1909 that a treaty made by the United States with Colombia from which Panama seceded in 1903 was not applicable to Panama.[4] The same view was adopted by the British Government of Panama's position in the matter of Colombian treaties.[5] On the occasion of the separation of Finland from Russia an exchange of notes took place between Finland and Sweden.[6] These notes did not lay down any principle but gave a list of agreements which continued to be valid in spite of the secession. In the same connexion the legal basis on which the United Kingdom was advised was that the treaties of the parent state (Russia) were not binding on the new state (Finland) and that there were no treaties in force between Finland and the United Kingdom.[7]

On the other hand, the American Department of State in 1929 took the view that a treaty of 1830 between the United States and Turkey still applied to Egypt.[8] It must be remembered, however, that although Egypt was, at the time the treaty was made, a vassal of Turkey, and had no separate treaty-making power in her own right, she was, nevertheless, an International Person, albeit semi-sovereign. There is an obscure statement by Bismarck during the Congress of Berlin, that it was a principle of the law of nations that a province separated from a state could not release itself from treaties to which it had hitherto been subject,[1] but the remark in the context has little legal value. In fact Article 38 of the Treaty of Berlin made Serbia responsible for the obligations of Turkey towards Austria-Hungary.[2] The case of the separation of Brazil from Portugal was a special one. There the Crown was advised that Brazil continued to be bound by Portuguese treaties because she was still linked to Portugal by a Personal Union.[3]

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[1] McNair, op. cit., pp. 434, 439.

[2] Keith, *Theory of State Succession* (1907), p. 19. But his reference to Wharton is not illuminating.

[3] Hall, *International Law* (8th ed. by Pearce Higgins, 1924), p. 119.

[4] Hackworth, *Digest of International Law*, vol. v (1943), p. 363.

[5] McNair, op. cit., p. 461.

[6] *British and Foreign State Papers*, vol. cxii, p. 1023.

[7] McNair, op. cit., p. 454.

[8] Hackworth, op. cit., vol. v, p. 366.

The question arose in 1933 regarding the continued application to the Irish Free State of treaties made by the United Kingdom. Mr. de Valera stated in the Dáil that 'the Government of the United States have never contended that treaties referred to in the Deputy's question are not in force between the Irish Free State and the United States. Such treaties have been acted upon as occasion has arisen.' He added that

> 'the present position of the Irish Free State with regard to treaties and conventions concluded between the late United Kingdom and other countries is based upon the general international practice in the matter when a new State is established. When a new State comes into existence, which formerly formed part of an older State, its acceptance or otherwise of the treaty relationships of the older State is a matter for the new State to determine by express declaration or by conduct (in the case of each individual treaty) as considerations of policy may require. The practice here has been to accept the position created by the commercial and administrative treaties and conventions of the late United Kingdom, until such time as the individual treaties and conventions themselves are terminated or amended. Occasion has then been taken, where desirable, to conclude separate engagements with the States concerned.'[4]

Although this statement is in accordance with the general trend of international practice, it will be seen that it is based on the assumption that the Irish Free State 'seceded' from the United Kingdom and that it gives no consideration to the question whether the Irish Free State was not in a special position as a member of the British Commonwealth of Nations. This is discussed below.

(*b*) *A new state or several new states are formed by dismemberment of an existing state or union of states*

Colombia. This was formed by New Granada, Venezuela, and Ecuador until, between 1829 and 1831, it broke up into three separate states. The

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[1] *British and Foreign State Papers*, vol. lxix, p. 961.

[2] Ibid., p. 763.

[3] McNair, op. cit., p. 418. See, however, the curious case of *The Mechanic*, cited by Chailley, *La Nature juridique des traités internationaux* (1932), p. 149.

[4] *Irish Free State Debates*, 11 July 1933. This quotation has been included at this point although the case of the Irish Free State was not one of secession.

British Government was advised 'that these three States did not start with a clean slate but inherited the treaty obligations of the former union'.[1] It would appear, however, that the opinions given were based on the principle that the member-states had, in spite of the union, retained their individual identity.

The cases which follow are instances in which a union existed of two sovereign states, the union being an International Person in the sense that it was the medium by which these persons contracted international obligations. Whether or not they were 'subjects of international law', they were identifiable entities bound, and *intended to be bound*, by the treaties contracted on their behalf.

Norway and Sweden. In 1905 Norway and Sweden, on the dissolution of the Union between them, addressed Notes to the British Government stating:

1. Those treaties which were made by the Union specifically for one member of it or which, although not specifically so made, concerned only that member, were no longer binding on the other member.
2. Subject to the above, both states continued to be bound by treaties made by the Union.
3. Nevertheless both states might wish to revise treaties falling into category 2.

His Majesty's Government said that the new situation gave rise to a right on its part to examine *de novo* the treaty engagements which bound Great Britain and the Dual Monarchy. The meaning of this statement is not clear, but it is capable of being construed as a reference to *rebus sic stantibus* or simply to the prospect of revising provisions by agreement in the light of the new situation. The United Kingdom Government did not deny the general validity of the conclusions set out in the Norwegian and Swedish Notes.[2] The United States declared that it held treaties concluded by the Union to be severally binding on its members.[3]

Austria-Hungary. When the Austro-Hungarian Monarchy came to an end, provisions were inserted in the Peace Treaties (Art. 234 St. Germain, Art. 261 Trianon) continuing in force certain multipartite conventions in their application to these states. As regards bilateral treaties the Allied and Associated Powers were entitled to notify to these states those treaties which they desired to revive or continue in force. However, the view of the United Kingdom Government was that, independently of such provisions, the two states continued to be bound by, and entitled to the benefit of, treaties made by the Dual Monarchy.[4]

Iceland-Denmark. The position of these states as a result of the 'fusion' which took place in 1918 has been discussed above. In 1944 this Union was dissolved, and Iceland became a fully independent sovereign state. The view taken by the United Kingdom Government was that agreements made by or on behalf of Iceland between 1918 and 1944 continued to be binding on her, as she was a state (an International Person) when they were concluded. Only the mode (constitutional procedure) by which they were concluded had changed. Iceland accepted the position that, pending the conclusion of any new agreements between her and the United Kingdom, she agreed temporarily to the continued validity of such agreements as were in force between the two countries.

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[1] McNair, op. cit., p. 413.

[2] *British and Foreign State Papers*, vol. xcviii, p. 833.

[3] Crandall, op. cit., p. 438.

[4] McNair, op. cit., p. 427.

Transjordan. Article 8 of the Treaty of Alliance between the United Kingdom and Transjordan of 22 March 1946[1] provides:

> '(1) All obligations and responsibilities devolving on H.M. the King in respect of Transjordan in respect of any international instrument which is not legally terminated should devolve on His Highness the Amir of Transjordan alone, and the High Contracting Parties will immediately take such steps as may be necessary to secure the transfer to His Highness the Amir of these responsibilities.
>
> '(2) Any general international treaty, convention or agreement which has been made applicable to Transjordan by H.M. the King (or by his Government in the United Kingdom) as Mandatory, shall continue to be observed by His Highness the Amir until His Highness the Amir (or his Government) becomes a separate Contracting Party thereto, or the instrument in question is legally terminated in respect of Transjordan.'

Strictly speaking, this was not an ordinary case of dismemberment, but it was a case in which a new state was formed by detaching territory which was subject to a mandate, and is therefore properly classifiable under the same head as cases of dismemberment generally. It will be seen that in this case there was a complete and absolute succession in respect of all treaties concluded by the United Kingdom in respect of Transjordan.

Iraq. Article 8 of the Treaty of Alliance between the United Kingdom and Iraq of 30 June 1930[2] provides:

> 'It is also recognised that all responsibilities devolving upon His Britannic Majesty in respect of Iraq under any other international instrument [the earlier part of the article refers to previous treaties of alliance signed in 1922 and 1926] in so far as they continue at all should similarly devolve upon H.M. the King of Iraq alone, and the High Contracting Parties shall immediately take such steps as may be necessary to secure the transference to H.M. the King of Iraq of these responsibilities.'

This provision, although not so comprehensive as those made in the case of Transjordan, produces the same practical effect.

(*c*) *India, Pakistan, Burma, and Ceylon*

Prima facie these cases are examples of (*b*) above: that is to say, they are in fact cases of separation (though not secession). Nevertheless, certain special considerations apply to them. In the first place, India had already acquired a status as an International Person since 1918, and before she attained Dominion status; Pakistan was a new creation derived by partition of India. It is clear, however, that India, though much reduced in territory, is the same International Person as before. The provisions dealing with the results of the separation must now be set out, and we shall return in this connexion to the case of the Irish Free State discussed above.

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[1] *British Treaty Series*, No. 32 (1946).

[2] Ibid., No. 15 (1931).

By the Indian Independence (International Arrangements) Order, 1947,[1] provision was made for the apportionment as between India and Pakistan of international rights and obligations as follows:

> '1. The international rights and obligations to which India was entitled and subject before the 15th day of August, 1947, will devolve in accordance with the provisions of this agreement.
>
> 2. (1) Membership of all international organisations together with all the rights and obligations attaching to such membership will devolve solely upon the Dominion of India.
>
> . . . .
>
> 3. (1) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.
>
> (2) Rights and obligations under international agreements having an exclusive territorial operation to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.
>
> 4. Subject to Articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions.'

It will be seen that the Order proceeds on the footing that India was already an International Person. Her position, so far as regards the treaty-making power, was substantially the same as that of the self-governing Dominions. She became a member of the League of Nations, was represented in her own right at international conferences, and became a member of the United Nations Organization. From the internal and constitutional aspect her position was different from that of the Dominions as the Government of the United Kingdom was able to control her action in foreign affairs. Nevertheless she had the status of an International Person just as Egypt had before 1936 and 1922—though subject to British control. Treaties made by India before 1947 fall into two categories: (*a*) those signed after 1919 'for India' or for the Government of India specifically, and (*b*) those concluded, before or after this date, simply in the name of the Crown, or in the name of the Government of the United Kingdom (or in the name of the East India Company, the Government of the United

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[1] *Gazette of India Extraordinary*, 14 August 1947.

Kingdom or the Crown having admitted their inheritance from that Company). In the case of treaties of the first class the position is clear. They were concluded for India as a distinct International Person, and must on any possible view continue to be binding on India. International engagements in this category include (i) obligations accepted by India as a Member of the League of Nations or United Nations; (ii) provisions of various bilateral and multilateral treaties and conventions to which India is a party; and (iii) commercial and similar treaties made by the United Kingdom with foreign countries to which India was a separate signatory or to which she subsequently acceded.

As regards Burma the Treaty between the Government of the United Kingdom and the Provisional Government of Burma regarding the recognition of Burmese independence and related matters, of 17 October 1947,[1] contains the following provisions:

> 'Article 2: All obligations and responsibilities heretofore devolving on the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Burma devolve upon the Provisional Government of Burma. The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Burma shall henceforth be enjoyed by the Provisional Government of Burma.'

Mutatis mutandis the same provision is contained in Article (6) of the External Affairs Agreement between the Government of the United Kingdom and of Ceylon signed on 11 November 1947.[2]

Mention has already been made above of the acceptance by the Irish Free State, when it became a Dominion, of treaty obligations contracted by the United Kingdom, in so far as they concerned the Irish Free State. When the other Dominions acquired international status in 1919, both they, and the Government of the United Kingdom and of other countries, accepted the position that the Dominions inherited all treaty rights and obligations of any kind, which had any possible territorial application to them, and not only treaties in which they were specifically mentioned. The practice adopted for India, Pakistan, Burma, and Ceylon was in line with what had gone before.

The case of the Dominions was a special case of dismemberment, albeit a voluntary one. There was a constitutional change, but the King remained King in all his Dominions, and could still contract for them on the advice of the responsible Dominion ministers. The Dominions, on the other hand, acquired the power to make treaties in their own right in the intergovernmental form. As Sir Arnold McNair has observed, 'the case of the British self-governing Dominions has now ceased to be one of capacity and has become one of form'.[1] From the international point of view a new Government and State arose within the same entity (the British Empire and Commonwealth) which was capable of acquiring rights and obligations as an International Person. The nearest analogy is the case of the separation of Brazil and Portugal, where the Crown was advised that, owing to the link of a Personal Union which continued between the two countries, Portuguese treaties continued to apply to Brazil.[2] It is not necessary to resolve for the present purpose the question whether the British Commonwealth is correctly classified as a Personal Union, but the analogy seems to the present writer to be a helpful one.

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[1] Cmd. 7360.

[2] Cmd. 7257.

A distinction must be drawn as between India and Pakistan. Treaties concluded by the Crown on behalf of India are prima facie in the same case as those concluded for other parts of the Commonwealth, and which were accepted by other Dominions on attaining international status. These therefore apply equally to Pakistan and India. But what of the treaties made by India in her own right between 1919 and 1947? As regards these particular treaties ('Non-Imperial' treaties) Pakistan would appear to be in the position of a state seceding peacefully from another; they do not continue to apply to her. India, on the other hand, continues to be an International Person bound not only by the 'Imperial' treaties, but also, and in addition, by her inter-governmental engagements. In order to deal with this position which would, unless remedied, involve India legally in treaty liabilities in respect of areas over which she had lost control, the Order of 1947 apportions treaty liabilities between the two Dominions. It will be seen that the order applies in terms to all international agreements, and that there is a voluntary acceptance by Pakistan of pre-partition agreements which have an exclusive territorial operation within the area under her jurisdiction.

III. *General conclusions*

The foregoing survey of international practice in cases where succession in fact occurs suggests the following reflections, which are put forward tentatively in the belief that a new approach to the subject is required.

In the first place it is believed that there is now sufficient material available regarding the practice of states to make it possible to assert the existence of positive rules of law on the subject of succession to treaty rights and obligations. It is desirable, and it makes for clarity, to avoid general theories on this question; and the advantages of so doing are apparent, not only from the inadequacy of the results so achieved, but also from the lucid view of the subject which is obtained when the topic is treated (as it is by Sir Arnold McNair) as falling under the province of the law of treaties. It is, to adopt his rubric, a question of 'changed conditions affecting the political status of a contracting party', and, in the present writer's submission, nothing has thrown greater light in recent times on the whole question than these succinct pages of the *Law of Treaties* (and the Opinions quoted therein) where the subject is dealt with.[1]

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[1] Op. cit., p. 135.

[2] Op. cit., p. 418.

Next, it is believed that, to adopt Hall's phrase, 'the fact of the personality of the State is the key to the answer'.[2] Complicated though the problem may be, an examination of practice shows that the difficulties are greater if there is a too rigid adherence to the doctrine of state succession and too little application to the question viewed as a problem of treaty law[3]—that is, the results of the survival or otherwise of the original contracting party. In practice it seems that a 'treaty vacuum' rarely arises; that is to say, it infrequently happens that no treaty system at all is applicable to the situation. Let us therefore summarize the results of our examination of practice in this light.

Where territory is annexed the treaties of the annexed state either fall to the ground with its extinction, or cease to be applicable to the annexed territory, and the annexing state is not bound by those treaties, though his own treaty system applies to the territory. When a violent secession takes place and a new state is born there is a complete vacuum; the new state starts with a clean slate, and the treaties of the mother country cease to apply to the seceding territory. The position in this respect is substantially the same where there is a cession of territory. Yet it is not quite the same. The ceding state has parted with its territory by agreement, and the treaty rights of third states cannot, it is submitted, be abrogated by its unilateral act. These rights are rights against the ceding state; and may it not be said, therefore, that the latter is under a legal duty to make arrangements in the treaty of cession so that such rights are respected so far as possible? Keith's hypothetical example of a possible cession of Newfoundland may be recalled in this connexion. He asks: Would Great Britain's treaty obligations towards France pass with the cession? He answers: Great Britain would be bound politically and legally 'either to satisfy

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[1] It is very strange that the handling of the subject by Chailley, *La Nature juridique des traités internationaux* (1932), pp. 146–59, writing at a time when at least some of the material cited in this article was available, should almost completely ignore that material, so that his account of practice is pitifully inadequate, and his discussion of the question as a whole is unsatisfactory. This avowedly 'positivistic' writer starts off by saying proudly that *he* is basing himself on practice, which he says is 'uncertain' (p. 148); he cites two or three concrete cases (anomalies when contrasted with the bulk of material he overlooks) and then goes off into several pages of abstract discussion. However, he makes one good point which is referred to later in the text of this article.

[2] *International Law* (8th ed., 1924), p. 114.

[3] Chailley, op. cit., p. 153, notices, rightly, that writers tend to ask which treaties are *applicable* before ascertaining which *survive*.

France's claim in Newfoundland or, if not, to cede the island to the United States of America subject to French rights'.[1]

In other cases—dismemberment and fusion—it will ordinarily be found that the original contracting party may undergo a change, but not a change so substantial as to lose its identity. There will generally emerge from the dismemberment either an enlarged or truncated form of an existing element in the old union, which can be regarded as a continuation of the personality of the original contracting party, or, on the other hand, the dismemberment results simply in a separation of existing International Persons. It is true that a total break-up may produce new states entirely free of the treaty obligations of their parent-state (Poland, Czechoslovakia), but other elements (Austria and Hungary) may be found to fill the vacuum and assume all the treaty obligations of the old entity.

The case of a fusion of two states so complete as to create an entirely new state is so rare in practice that it is doubtful whether it ever really arises. One of the merging elements survives in an enlarged form, and retains its own treaty obligations; those of the extinguished state lapse entirely, but there is no 'treaty vacuum' as the treaty system of the enlarged state applies to its new territory.

There remains the case of the British Dominions. The case may be viewed either as a special one, because the Crown could contract for them, both before and after their accession to international status; or, if this is thought too specious (having regard to the power of the Dominions to make their own treaties without making the Crown a party), it may be said that, by agreement, these new International Persons assumed the obligations of treaties made before they became such (again by agreement) in so far as concerns them. Where a partition takes place within the Dominion the case is governed by the ordinary rules, so far as Dominion agreements are concerned, but so far as 'Imperial' treaties are concerned, it is again a special case. What is certain is that there has been no secession and no 'breaking up' (for the common Crown remains).

Lastly, we come to a point of which little has been said here as yet: Which type of treaty passes? As already indicated, this is a subsidiary question, the first question being in which cases treaties pass in principle. If they pass at all, they all pass in principle. The question whether some of them fall to the ground is not a problem of state succession but of treaty law. There are rules on the subject of impossibility of performance, changed conditions, &c.: it is a question of ascertaining whether a particular treaty is applicable to the new situation.[2] It is not proposed to pursue this question. Similarly, the rule that one type of treaty always passes wherever there is succession in fact, i.e. the 'real' type creating local obligations, is probably incorrectly formulated. The treaty may contain other provisions which do not pass; it is not the *treaty* which passes, but this particular type of *obligation*: therefore this is not a case of succession to treaties—'a general exception'—but a case of succession to obligations which happen to have been created by treaty. One can either say, 'these are servitudes and, by force of general international law, they bind the territory irrespective of all transfers', or one can say with Vattel,[1] 'others have acquired certain rights in the territory, and no one can acquire rights which have been disposed of elsewhere'. Or, finally, one may simply regard the treaty by which the rights are created as a document of title, being a treaty 'having the character of a conveyance',[2] the right itself having an independent source of validity—'true objective law', as in the Aaland Islands case. But, to quote Sir Arnold McNair, 'in fact, look at it which way you will, rights of this character have a certain "reality" about them; they are not purely contractual rights *in personam*'.[3]

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[1] Keith, *Theory of State Succession* (1907), p. 23.

[2] The admirable King's Advocate's Opinion quoted by McNair, op. cit., p. 419, brings this out clearly; see also Chailley, op. cit., p. 153.

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[1] See Crandall, op. cit., p. 431; and McNair, op. cit., pp. 127–8, and chap. xxxviii.

[2] This *Year Book*, 11 (1930), p. 101.

[3] Ibid., 6 (1925), p. 116; see also Crandall, op. cit., p. 431.

NOTES

THE INTERNATIONAL TRADE ORGANIZATION

THE history of the preparations for establishing an international trade organization, as a specialized agency of the United Nations, may be briefly noted. The Economic and Social Council passed a resolution in February 1946 for the calling of an international conference on trade and employment: this resolution set up a Preparatory Committee 'to elaborate an annotated draft agenda including a draft convention, for consideration by the Conference', and appointed as its members the representatives of the Governments of the following countries: Australia, Belgium, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, the Lebanon, Luxemburg, the Netherlands, New Zealand, Norway, South Africa, U.S.S.R., the United Kingdom, and the U.S.A.

The U.S.S.R. did not send a representative to the Preparatory Committee. In December 1945 the Government of the U.S.A. had published and transmitted to other Governments for their consideration 'proposals for the expansion of world trade and employment', and, in preparation for the World Conference, elaborated them in the form of a draft charter for the International Trade Organization. The Preparatory Committee assembled in London in September 1946, and from its discussions, which were centred mainly on the United States draft charter, there was evolved a new draft charter embodied with a long introductory commentary in the report of the first session of the Preparatory Committee published in London in October 1946. This draft charter was amended and improved by a drafting committee of the Preparatory Committee, which met in New York in the first months of 1947 and issued a report containing a new text on 5 March 1947. The Preparatory Committee at its first session in London also resolved to negotiate a multilateral trade agreement embodying tariff concessions.

The second session of the Preparatory Committee opened at Geneva in April 1947. Discussions of the New York draft of the I.T.O. Charter were conducted side by side with negotiations for a general agreement on trade and tariffs between the countries represented on the Preparatory Committee, and the report of the second session consists of an improved and amended version of the New York draft of the I.T.O. Charter.[1] The World Conference on Trade and Employment, contemplated in the Economic and Social Council's resolution of February 1946, was due to open at Havana on 21 November. The main objectives of this Conference were to discuss and amend as necessary the draft charter for the I.T.O. prepared by the Preparatory Committee and to recommend it to Governments for their acceptance; upon the entry into force of the Charter the International Trade Organization will be established.

The draft charter contained in the report of the second session of the Preparatory Committee, which will be now referred to as the Draft Charter, is the most elaborate and massive international instrument of its kind. It falls into two parts: Chapters II to VI, which form in effect an extensive commercial convention, and Chapter VII, which is the constitution of the I.T.O. Chapter I explains the connexion between these two parts, and Chapters VIII and IX are subsidiary. Chapter I contains a single article setting out the purpose and objectives. Chapter II (Arts. 2–7) is headed Employment and Economic Activity, and deals with the importance of the maintenance of domestic employment and fair labour standards and the relation of employment to balance of payments difficulties; Chapter III (Arts. 8–15) is headed Economic Development and is directed to the problems of the economically backward countries and international investment; Chapter IV (Arts. 16–43) deals with Commercial Policy under six sections: Tariffs, Preferences and Internal Taxation and Regulations; Quantitative Restrictions and Exchange Controls; Subsidies; State Trading; General Commercial Provisions, which are largely concerned with the administrative aspects of trade; and Special Provisions, which deal with, *inter alia*, emergency action on imports of particular products, customs unions, and general exceptions. Chapter V (Arts. 44–51) and Chapter VI (Arts. 52–67) deal with restrictive business practices and intergovernmental commodity agreements respectively. Chapter VII (Arts. 68–88) forms the constitution of the International Trade Organization. Chapter VIII (Arts. 89–92) sets out the procedure for the settlement of differences arising out of the application and operation of the Charter. Chapter IX (Arts. 93–100) consists of general provisions.

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[1] Published by the Stationery Office, Cmd. 7212.

The purpose of this Note is to consider certain legal aspects of the Draft Charter.

The basic instrument of a specialized agency or any similar international organization has two aspects. It is a multipartite contract containing a number of obligations and it is also the written Constitution of the Organization which it establishes. It follows that the participating states may be regarded, first, as contracting parties to the basic instrument, assuming the obligations set out in it; secondly, as members of the Organization constituted by it. Again, these obligations may be formulated in two ways, directly, as specific undertakings by each contracting party, or indirectly, as powers or functions attributed to the Organization, and to be exercised by it, as the *persona* masking the Members. Thus, a state might become a contracting party to the I.T.O. Charter under Article 98: it would be a Member of the I.T.O. under Article 68; it would for example have a direct obligation under Article 14 to grant unconditional most-favoured-nation treatment to other Members with respect to customs duties and charges on the importation and exportation of goods; it would have also an indirect obligation, in cases where action is required of the Organization by the Charter, to contribute to or at least assent to that action.

The basic instrument of the World Health Organization is almost entirely a constitution and is so entitled; by far the greater number of the obligations assumed by its contracting parties are therefore indirect. Those of the Food and Agriculture Organization and the United Nations Educational, Scientific, and Cultural Organization are similar, while the International Civil Aviation Convention and the Charter of the United Nations are evenly balanced conventional and constitutional instruments. But in all of them the identification of the contracting parties to the basic instrument with the Members of the Organization which it constitutes blurs the distinction between the conventional and constitutional aspects. Now the Draft Charter goes farther than any other basic instrument towards maintaining the distinction, and a comparison of the London text of the Draft Charter with the Geneva text will show how this has come about. In the London text, Membership was dealt with in a separate Chapter II; while Chapter VIII, as it then was, was headed 'Organisation', a title which, when spelt out as 'Organisation of the International Trade Organisation', was seen to be faulty. Chapter VIII also contained the general provisions which relate to all the Chapters and therefore should be set out in a Chapter of their own. The Draft Charter has placed the Membership Article in Chapter VII, which is now entitled 'The International Trade Organisation', and has removed the Settlement of Differences and the General Provisions to two separate Chapters. Chapter VIII is thus marked off as the constitution of the I.T.O. and, as will be shown below, a step has been taken in that Chapter towards constituting the Members of the Organization as a class overlapping but not identical with the class of contracting parties.

Chapters II–VI of the Draft Charter are an amalgam of statements of economic principle, *vœux*, and formal obligations. For example, Articles 2, 8, 12, 13, 15, and 23 contain propositions beginning: 'The Members recognise that . . .'. These propositions embody some economic or commercial principle which is generally taken up into a formal obligation in a later Article. Other Articles are cast in the form of obligations so loose and vague as to be little more than resolutions; for example, Article 34 (1) begins: 'The Members shall work toward the standardisation, as far as practicable, of definitions of value and of procedures for determining the value of products subject to customs duties or other charges or restrictions based upon or regulated in any manner by value.' Paragraphs 1 and 2 of Article 35 are a peculiar mixture of statement of principle and resolution.

If normal practice were followed, as at Bretton Woods, the provisions of the Draft Charter which do not import strict obligations would be embodied in a Final Act of the Havana Conference. Two principal reasons may be suggested why the Draft Charter has been arranged differently by the Preparatory Committee. First, the original United States draft proposals, set out in all the doctrinal purity of an economist's essay on multilateralism and charged with the immense economic influence of the United States of America, have inevitably done much to mould the form of the Draft Charter, and there has been great unwillingness[1] to leave out the statements of principle they contained. Secondly, the Articles exemplified above serve the same purpose as the preamble[2] of older Acts of Parliament; they tell us what the succeeding Articles in the section or Chapter in which they occur are about, give guidance in their interpretation, and indicate the general trade situation in which the Article or Chapter is designed to operate. Though it may be formally displeasing to have *vœux* and statements of principle intermingled with strict obligations, it is plainly convenient, in view of the size and complexity of the Draft Charter, to have these signposts in it.

A novel principle has also been introduced in the Draft Charter as an aid to its interpretation. Notes will be found appended to Chapter III, Articles 12 (2) and (3), 14 (1) (*c*), 16 (2), 17, 21 (2) and (3), 22 (2) and (4), 24 (4), 30, 31, 32 (5), 33, 34 (2) and (3), 35 (5), 52, 54, 60, 69 (*c*). It is to be assumed that these notes were submitted by the Preparatory Committee for the guidance of the World Conference, and are brief summaries of the *travaux préparatoires* of the more difficult and obscure Articles. It is possible that this method of providing ready-made interpretations of certain provisions will be used in the final text of the I.T.O. Charter. It confesses a failure to formulate adequately the intention of the contracting parties in the Article itself which the note explains, but nevertheless it may be useful provided that the notes (*a*) are not inserted too frequently; (*b*) are absolutely clear and not themselves of doubtful meaning; and (*c*) are unanimously agreed by the contracting parties.

In considering Article 68, which is concerned with Membership of the Organization, it may be said that there are three principal ways in which countries participate in an international organization. First, membership of the Organization may be limited to the contracting parties to the Convention which establishes the Organization, these contracting parties being states; secondly, provision may be made in the Convention for it to be extended to the dependent territories of states which are Members of the Organization; thirdly, a class of members of lesser status than the Member States may be created to comprise dependent territories, part-sovereign states, and countries whose status is politically ambiguous. The first two kinds of participation are common enough; the third kind, though less familiar,[1] is being more and more frequently adopted and the Draft Charter is the latest instrument in which it appears.

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[1] The Draft Charter has been sharply criticized in some quarters for the number of exceptions to these principles which it now contains.

[2] At the first session of the Preparatory Committee it was proposed that each Chapter should have a preamble setting out at length the principles underlying the Articles in the Chapter.

Article 68 provides for two classes of members of the I.T.O.[2]

It is possible that this creation of a class of members of lesser status than full states is a stage in the disintegration of the doctrine that only countries which are states can be contracting parties to an international convention and therefore members of any organization which it constitutes. The need to create such a class of members has arisen for two reasons. First, since 1944 a number of international organizations 'having wide international responsibilities', to quote the words of Article 57 of the United Nations Charter, have been established, which are primarily functional and not political organizations. In spite of the ill-starred principle expressed in the United Nations Charter,[3] many countries have resisted, and rightly resisted, the application of this principle to some of the specialized agencies of the United Nations. They have insisted that the participation by the countries of the world in international technical work cannot properly be based on their international status as sovereign states, but on their competence—whether they are sovereign states or dependent territories—to co-operate effectively. Secondly, the temper of world opinion, expressed in the deliberations of the General Assembly of the United Nations, is now more than ever favourable to the self-determination of peoples, and has helped to break down the distinction in the membership of functional organizations between sovereign states and dependent territories. For example, where in the field of telecommunications, health, or commodity control an international body is set up with technical and administrative tasks to perform, it is manifestly impossible to exclude from membership of such a body countries which, by reason of their special interest or the contribution that they can make, are entitled to it, merely because they are not responsible for the conduct of their international (political) relations. Indeed, there are cases where the participation of a dependent territory as a separate member may be essential for the international body to work at all. This principle has been for a long time recognized by the Universal Postal Union and the International Telecommunications Union, and recently by the World Health Organization and the Draft Charter.

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[1] The membership of the Universal Postal Union is anomalous, and will be discussed below.

[2] That Article reads as follows:

MEMBERSHIP

1. The original Members of the Organization shall be those States invited to the United Nations Conference on Trade and Employment whose Governments accept this Charter by ....194... in accordance with paragraph 1 of Article 98, or, if this Charter shall not have entered into force by............194..., those States whose Governments agree to bring this Charter into force in accordance with the proviso in paragraph 2 of Article 98.

2. Any other State whose membership has been approved by the conference shall become a Member of the Organization upon its acceptance, in accordance with paragraph 1 of Article 98 of this Charter, as amended up to the date of such acceptance.

3. The following separate customs territories, though not responsible for the formal conduct of their diplomatic relations, shall be admitted to the Organization on such terms as may be determined:

(i) any separate customs territory invited to the United Nations Conference on Trade and Employment upon acceptance of the Charter on its behalf by the competent Member in accordance with paragraph 2 of Article 99;

(ii) any separate customs territory not invited to the United Nations Conference on Trade and Employment, proposed by the competent Member having responsibility for the formal conduct of its diplomatic relations and which is autonomous in the conduct of its external commercial relations and of the other matters provided for by this Charter and whose admission is approved by the Conference, upon acceptance of the Charter on its behalf by the competent Member in accordance with paragraph 2 of Article 99, or, in the case of a territory in respect of which the Charter has been accepted under paragraph 1 of Article 99, upon its becoming thus autonomous.

4. Any separate customs territory admitted to the Organization under paragraph 3 of this Article which is accorded full voting rights shall thereupon be a Member of the Organization.

5. The Conference shall determine the conditions upon which membership rights and obligations shall be extended to Trust Territories administered by the United Nations and to the Free Territory of Trieste.

[3] Art. 2 (1): 'The Organization is based on the principle of the sovereign equality of all its members.'

Before passing to the Draft Charter, it is worth while considering the membership provisions of the Universal Postal Union and the World Health Organization. The Convention of the Universal Postal Union signed at Paris on 5 July 1947 provides for membership as follows:

> Article premier—Constitution et but de l'Union.
>
> 1. Les Pays entre lesquels est conclue la présente Convention forment, sous la dénomination d'Union postale universelle, un seul territoire postal pour l'échange réciproque des correspondances.
>
> Article 3—Nouvelles adhésions.
>
> 1. Tout Pays souverain peut demander à adhérer en tout temps à la Convention.
>
> Article 8—Colonies, Protectorats, etc.
>
> Sont considérés comme formant un seul Pays ou une seule Administration de l'Union, suivant le cas, au sens de la Convention et des Arrangements en ce qui concerne notamment leur droit de vote aux Congrès, aux Conférences et dans l'intervalle entre les réunions ainsi que leur contribution aux dépenses du Bureau international de l'Union postale universelle: (1) L'Ensemble des Possessions des États-Unis d'Amérique comprenant Hawaii, Porto-Rico, Guam et les Îles Vierges des États-Unis d'Amérique; (2) la Colonie du Congo belge; (3) l'Ensemble des Colonies espagnoles; (4) l'Algérie; (5) l'Indochine; (6) l'Ensemble des autres Territoires d'Outre-Mer de la République Française et des Territoires administrés comme tels; (7) l'Ensemble des Territoires britanniques d'Outre-Mer y compris les Colonies, les Protectorats et les Territoires sous mandat ou sous tutelle exercé par le Gouvernement du Royaume-Uni de la Grande-Bretagne et de l'Irlande du Nord; (8) Curaçao et Surinam; (9) les Indes néerlandaises; (10) les Colonies portugaises de l'Afrique occidentale; (11) les Colonies portugaises de l'Afrique orientale, de l'Asie et de l'Océanie.

Article 9 provides for extension of the Convention to other colonies and protectorates.

The Preamble to the Convention commences: 'Convention Postale universelle conclue entre', and a list of countries follows which includes not only the territories listed in Article 8 but also Korea, Tunis, and Morocco.

The following comments may be made on this Convention:

(i) Membership of the Union is not defined as such but the territories listed in the Preamble are 'Les Pays de l'Union', or 'Administrations de l'Union' as they are sometimes called; but the basic idea is that the postal union is composed of all territories having a separate postal administration.[1]

(ii) The form of the Preamble and the Articles cited exhibit a confusion of ideas. On the one hand, territories having separate postal administrations, even though they are dependent territories in the political sense, are 'Pays de l'Union'; this idea is reduced to absurdity in the creation of 'ensembles', which, though they are not political entities and certainly not legal or even postal entities, not only have separate representation and a vote in the Postal Congress, but are separate parties to the Convention. On the other hand, admission of new countries to the Union is severely limited by Article 2 to sovereign states.

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[1] 'La notion de Pays comporte essentiellement un territoire, en l'espèce un territoire postal': *Actes de l'U.P.U.*, Buenos Aires (1939), p. 3.

(iii) The anomalous composition of the Postal Union is explained and perhaps justified by its history; it has always aimed at universality, it has been in the past entirely non-political, and it has worked. But it is unfortunate that the recent Congress missed the opportunity to put the Convention in order and achieve all that it desired by the simple separation of membership from legal participation in the Postal Convention.

In the Constitution of the World Health Organization it is provided by Article 8 that: 'Territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as Associate Members by the Health Assembly upon application made on behalf of such territory or group of territories by the Member or other authority having responsibility for their international relations. Representatives of Associate Members to the Health Assembly should be qualified by their technical competence in the field of health and should be chosen from the native population. The nature and extent of the rights and obligations of Associate Members shall be determined by the Health Assembly.' There are three points of interest here: (i) territories or groups of territories may be admitted as Associate Members; here the idea of the colonial 'ensemble' is used but in a practical and legally acceptable way, since the group would presumably be not all the dependent territories of a particular Member but either neighbouring territories or territories having common health problems; (ii) the dependent territories will assume the rights and obligations of Associate Members under the W.H.O. Constitution, not by reason of the acceptance of it under Article 79 by the Member responsible for their international relations, but by the authority of the Health Assembly; (iii) the term Associate Member indicates the lesser status of dependent territories and it is doubtful whether it will be generally acceptable. The Draft Charter rejects it.

The Draft Charter does not make use of the term Associate Member nor does it define the kind of membership which the dependent separate customs territories will enjoy; but it contemplates their having a vote in the Conference of the Organization. It therefore comes very near to the legal severance of Members and Contracting Parties. If, however, the I.T.O. Charter were to be drafted in two distinct parts, the Trade and Employment Convention and the Constitution of the I.T.O., the problem would be solved. The contracting parties to the Charter would be states; the Constitution of the I.T.O. would form a separate part of the Charter and would provide that all countries could be Members, without qualification, of the I.T.O. provided that they were either states, parties to the Charter, or dependent territories of Member States to which the Charter had been extended. In this way the rights and obligations of dependent territories would be legally carried by the Member States as parties to the Charter, but the position of these territories as Members of the Organization under its constitution would not be compromised. If, however, it was desired to secure the predominance of Member States in the Conference, it would be possible to reserve to them decision on amendments to the Constitution, and possibly other matters. Subject to such reservation of powers, dependent territories would be in every respect full Members of the Organization.

In general, it would be convenient and just that where an international body exists or is set up with technical or administrative tasks to perform in such fields as communications, transport, health, commodity control, meteorology, trade, and employment, dependent territories whose governments have unlimited power, either in law or constitutional practice, to legislate in these fields within those territories should be entitled to become full Members of such an international body, provided that they have a special interest in that field or are able to make a special contribution to the work of the international body. It is arguable, though not essential, that they should become contracting parties to the convention establishing such international body.

The principle which is implicit in the basic instruments of the United Nations and other international organizations that these organizations are international legal persons, not of full status but of sufficient status to give them the legal capacity necessary for the exercise of their functions, as defined in the basic instrument, is expressed in Article 86, entitled 'International Legal Status of the Organisation'. The Article reads: 'The Organisation shall have legal personality and shall enjoy such legal capacity as may be necessary for the exercise of its functions.' This Article should quiet doubts which have arisen with other specialized agencies as to the capacity of the Organization to make international agreements.

J. E. S. Fawcett.

OWNERSHIP OF THE SEA-BED

United States of America v. *State of California*[1]

When the President of the United States issued a proclamation on 28 September 1945 by which he declared that the subsoil and the sea-bed of the Continental Shelf beneath the high seas contiguous to the United States were subject to its jurisdiction and control, he did not answer the question whether the sea-bed belonged to the individual states or to the Federal Government. In fact, the executive order issued concurrently with the proclamation expressly disclaimed any effect upon issues between the United States and the several states relating to this question. Nevertheless, the growing recognition of the potential value of oil and other resources to be found on the Continental Shelf brought to a head the controversy, which had raged with some heat in the United States, as to the ownership and control of the subsoil and sea-bed lying beneath the waters surrounding the United States.

A joint resolution of both Houses of Congress was passed renouncing in favour of the adjacent states a three-mile belt of all land situated under the ocean beyond the low-water mark; but this resolution was vetoed by the President. There is also a long series of judicial decisions of various courts in the United States on the ownership of what have been loosely called the tide-waters and tide-lands. The leading case is *Pollard's Lessee* v. *Hagan* (3 How. 212), where it was decided that the original thirteen states owned the navigable tide-waters between the high- and low-water mark within each state's boundaries, and the soil under them. This case has been followed in numerous decisions, in some of which the word 'tide-lands' has been used ambiguously, and there have been dicta which suggest that the rule in the *Pollard* case applies not only to the soil above low-water mark, but also to the soil beneath the waters to the seaward of low-water mark. There was sufficient weight of opinion to lead Professor

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[1] Supreme Court of the United States, No. 12, Original, October Term, 1946.

Borchard to the firm conclusion that the rights in question belonged to the states individually, and not to the United States.[1]

In the case of *United States* v. *California* the Supreme Court of the United States reached the opposite conclusion. In this case, the Attorney-General of the United States filed a suit against the State of California alleging that the United States 'is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low watermark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles'. The complaint also alleged that California had granted leases permitting the lessees to enter upon the described ocean area to take petroleum, gas, and other mineral deposits, and asked for a decree declaring the rights of the United States in the area as against California and enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

This case raised a purely constitutional issue and it had nothing to do directly with the doctrine of the Continental Shelf as stated in President Truman's declaration. Most of the answers submitted on behalf of California were technical in character, and it is unnecessary to consider them here. Having disposed of the more technical defences, the majority of the Court faced the main issue on its merits and held that California is not the owner of the three-mile marginal belt along its coast; and 'that the Federal Government rather than the state has paramount rights in and powers over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil'.

This decision was reached on the basis of what appears to be a combination of legal and political thought. It was recognized that if, at the time when California became a member of the United States, she owned the soil under the three-mile belt of sea, the answer should be given in her favour. As in the case of other states, California joined the Union 'on an equal footing with the original States in all respects whatever'. Therefore, if the original thirteen states were the owners of the three-mile belt at the time when the Union was formed, it would follow that California acquired similar rights to the three-mile belt adjoining her coast when she became a member of the Union.

The Court distinguished the *Pollard* case and those which followed it on the grounds that the decisions were only in respect of inland waters and tide-lands as far as low-water mark, and there was no necessity to extend the application of the rule in the *Pollard* case to areas beyond low-water mark. The majority of the Court refused to say that the original thirteen colonies separately acquired ownership in the three-mile belt or the soil under it. This opinion was based on their view of the history of the development of the idea of the extension of territorial sovereignty over the three-mile belt. Commenting on this history, they said:

> 'At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England,

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[1] 'Resources of the Continental Shelf', in *American Journal of International Law*, 40 (1946), pp. 53–70.

nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

'It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence.'

Professor Borchard, in the article in the *American Journal of International Law* mentioned above, denies that the United States is committed permanently to the three-mile limit, on the ground that there is no rule of international law on the subject. Logically, in his view, there is no apparent reason why the United States should adhere indefinitely to the three-mile rule. The judgment of the Court in the case under discussion, however, seems to go beyond the view expressed by Professor Borchard and to recognize the rule as to a three-mile belt of territorial waters as being a rule of international law, on the ground that it has been generally accepted throughout the world. It remains to be seen how far this rule will be acknowledged by the United States in the future. The Government may not feel itself bound by the views of the Supreme Court, if it has occasion to assert jurisdiction beyond the limits of the three-mile belt. The view expressed by the Supreme Court may make such an extension more difficult, but it can hardly be said to exclude the possibility entirely. It is noticeable that the judgment of the Court nowhere expressly speaks of the three-mile belt as being a limit on the territorial jurisdiction of the United States. It speaks rather of the extension of the territorial jurisdiction of a state in the area of the three-mile belt of marginal sea, without offering any comment as to whether there is a possibility in the future of territorial jurisdiction being extended beyond that belt. Although the principle of the freedom of the high seas has been repeatedly recognized by the United States, it is conceivable that development of resources of the sea-bed outside the three-mile limit, but on the Continental Shelf, will in course of time give rise to claims to the extension of territorial waters. The basis might be the same as that which has frequently been given as the basis for the three-mile rule itself, namely, the need to protect the interests of the adjacent state.

It was by a process of argument somewhat similar to this that, having decided that California had no claim, by virtue of the terms of its accession to the Union, to the sea-bed under the sea within the three-mile belt, the majority of the Supreme Court came to the conclusion that the paramount rights over this area were vested in the Federal Government. They based themselves on the importance of this area in international commerce in times of peace, and for the protection of the nation in time of war. They reasoned that as peace and world commerce were interests of the nation as a whole, the right to exercise paramount powers over the three-mile belt must vest in the nation rather than in the individual states. They also reasoned that the 'very oil about which the state and Nation here contend might well become the subject of international dispute and settlements'.

The exact decision of the Court is of some interest because although the action was framed in trespass, as Mr. Justice Frankfurter pointed out in his dissenting judgment, the Court refrained from stating specifically that the Federal Government was the owner of the area in dispute. The Court declared that California was not the owner of the three-mile marginal belt along its coast, and that the Federal Government, rather than the state, had paramount rights in and power over that belt, an incident to which was full dominion over the resources of the soil under that water area, including oil.

Mr. Justice Frankfurter was of the opinion that, even assuming that the Court was right in its view that the original thirteen states had not acquired title to the three-mile belt, it did not follow that this area had become vested in the Federal Government, and that such a decision was more proper to be made by the President and Congress than by the Supreme Court.

Mr. Justice Reed also dissented from the decision of the Court, but his view was that the original thirteen states had owned the lands under the seas up to the three-mile limit, and accordingly that California, having been admitted to the Union on an equal footing, had the same rights of the United States in war or peace, as the power of the United States over these under-sea lands would be as plenary as it is over every river, farm, mine, and factory of the nation.

F. A. V.

THE TRUSTEESHIP SYSTEM AND THE CASE OF SOUTH-WEST AFRICA

Apart from its special interest to the British Commonwealth, the case of South-West Africa focused several legal issues involving not only the fate of this territory, but also the question of the treatment of ex-enemy territories, the legal effect of General Assembly resolutions, and the relation of trust territories to non-self-governing territories. Field-Marshal Smuts presented the position as seen by South Africa to the General Assembly on 4 November 1946. He pointed out that the Union Government, in statements forming part of the official documentation of the Conference, had reserved its position in relation to South-West Africa both at San Francisco and at the General Assembly in January 1946. This was to give the Union time to make a careful inquiry as to the desires of the local population. That inquiry had indicated that the majority of the inhabitants (including all members of the South-West African Legislative Assembly) desired incorporation of the territory in the Union. Administration of the Territory since 1920 as an 'integral portion' of the Union, its 'geographical contiguity', common frontier, and ethnological kinship, its economic and strategic unity with South Africa, had already integrated it with the Union. But formal incorporation was desirable to satisfy the wishes of the inhabitants as well as to remove doubts as to its status and so to attract the capital needed for development.[1] The Union Government therefore proposed that the Territory be incorporated in the Union.[2] The General Assembly rejected this proposal on 14 December 1946, after long debate. It held that 'the African inhabitants' of the Territory had not yet 'reached a stage of political development enabling them to express a considered opinion' on such a question. The Assembly went on to invite South Africa to propose a trusteeship agreement.[3]

A second consultation of the African inhabitants, in which the Union Government reported to them the view of the General Assembly, showed a large majority still in favour of incorporation. In these circumstances, to have implemented the Assembly's resolution would, in the Union Government's view, mean flouting the wishes of the inhabitants. The Union Government announced therefore to the General Assembly in September 1947 that it had decided (1) not to proceed with incorporation; (2) 'to maintain the status quo and to continue to administer the Territory in the spirit of the existing mandate'; (3) to give the Territory representation in the Union Parliament as an integral part thereof.[1] What was intended by the *status quo* was explained by the representative of South Africa to the Fourth Committee as follows:

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[1] The absence of certainty as to the status of mandated territories has always been a serious deterrent in the matter of investment of private capital, and this factor retarded the development of industry, e.g. mining in South-West Africa. See 'Trusteeship System', *supra*, pp. 33-71.

[2] U.N. Doc. A/123, 1946, and declaration by Field-Marshal Smuts before the Fourth Committee on 4 November 1946.

[3] U.N. Doc. A/64, 1946, Add. 1, p. 124.

> 'The annual report which his Government would submit on South-West Africa would contain the same type of information on the territory as is required for Non-Self-Governing Territories under Article 73(e) of the Charter. It was the assumption of his Government, he said, that the report would not be considered by the Trusteeship Council and would not be dealt with as if a Trusteeship agreement had in fact been concluded. He further explained that, since the League of Nations had disappeared, the right to submit petitions could no longer be exercised, since that right presupposes a jurisdiction which would only exist where there is a right of control or supervision, and in the view of the Union of South Africa no such jurisdiction is vested in the United Nations with regard to South-West Africa.'[2]

The Fourth Committee maintained its position in a resolution urging presentation of a trusteeship agreement in time for the next General Assembly, and authorizing the Trusteeship Council to examine the report on South-West Africa already forwarded by the Union.[3] The resolution asserted that it was the 'clear intention' of the Charter that all mandated territories should be brought under trusteeship (if not given prior independence). The General Assembly on 1 November 1947 watered down the resolution. It rejected the paragraph presuming to interpret the 'clear intention' of the Charter. Whilst it urged the Union Government to submit a trusteeship agreement, the resolution merely hoped this might be possible in time for discussion at the next General Assembly.

As regards the charge of 'non-compliance' with an Assembly resolution, the South African delegate pointed out that the Assembly was not the legislature of a world state. Its resolutions did not have the force of law and might be disregarded if a state had compelling reasons, as South Africa did in this case. The United States delegate agreed that the Assembly could only recommend action, but insisted that its recommendations had a 'moral power';[4] whilst the representative of 'the United Kingdom considered that the South African Government was fully entitled to adopt the attitude it had taken'.[5]

Perhaps the weakest part of South Africa's position was in the matter of petitions. Petitions emanate from private individuals, and are taken as a natural human right. They can be ignored by the Union Government, but not prevented. It was true that the United Nations had no legal jurisdiction in the matter of petitions from South-

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[1] U.N. Doc. A/34, 1 August 1947, and Addendum, 22 September 1947.

[2] U.N. Doc. A/422, 27 October 1947.

[3] The Trusteeship Council at its Second Session took the view that, since existing rights under Article 80 must not be infringed, it should (1) examine the report not as one from a trust territory but as if the Council were the Mandates Commission; (2) that it should not receive petitions or petitioners, its authority from the General Assembly being confined to examining and submitting observations on the report for South-West Africa: Doc. T/P.V./33, 1 December 1947.

[4] U.N. Doc. A/C.4/SR 33.

[5] Report of Fourth Committee, Doc. A/422, 27 October 1947.

West Africa; but neither had the League of Nations. For petitions were provided for only by a decision of the League Council, voluntarily accepted by the mandatories, after the mandates had been confirmed.

The Fourth Committee of the Assembly debated at great length whether the obligation of South Africa to submit a trusteeship agreement was legal or moral, or both. Twenty-two states held that there was both a legal and a moral obligation. Eleven states, including the United States of America and all the members of the British Commonwealth save India, denied that there was any legal obligation; some of them doubted whether in the light of all the facts it was reasonable to assume the existence of any moral obligation. The Assembly's resolution as finally adopted showed that a two-thirds majority felt that South Africa *should* submit a trusteeship agreement. That the General Assembly shared the doubt about a legal obligation, and was unwilling to press the legal issue, was shown by its rejection of the words 'clear intention'. No action was taken on the suggestion by several delegations that the matter be referred for an advisory opinion to the International Court of Justice as the 'principal judicial organ of the United Nations'.

The weight of the legal argument was clearly in favour of the voluntary theory; and there is much evidence that this view was widely accepted at the San Francisco Conference both by the delegates and by the secretariat.[1] In the General Assembly itself the states presenting trusteeship agreements emphasized the voluntary nature of their action. Thus the British delegate said: 'We have voluntarily, I emphasize the word voluntarily, offered to place all our African mandated territories under the trusteeship system.'[2]

In support of the 'voluntary' nature of the system delegates relied on the permissive language of four Articles: Article 75 ('such territories as may be placed thereunder by subsequent individual agreements'); Article 77 ('The Trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements' and '(2) It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms'); Article 79 (terms of trusteeship to be agreed by Mandatory Power); and Article 80, paragraph 1 (conserving the rights of the mandatories in the interval 'until such agreements have been concluded'). Supporters of the

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[1] Thus the voluntary basis of the system as a whole in its application to all categories of territories was emphasized in the reports on the San Francisco Conference made immediately after its termination by the American and Canadian delegations. The United States delegation took as its 'guiding principle' that 'territories now administered under the mandate system may be placed under the new trusteeship system if and when such agreement [of the States directly concerned] is reached' (*Report to President on Results of San Francisco Conference by Secretary of State*, U.S. Dept. of State Publications No. 2349, Conf. Series 71, dated 26 June 1945). The Canadian Report on U.N.C.I.O. (Dept. of Ext. Affairs, Conf. Series, 1945, No. 2, p. 50), in mentioning the rejection of an Australian scheme to introduce the element of compulsion, adds: 'The Committee rejected proposals involving an element of compulsion, on the ground that these would entail legislating beyond the competence of the Conference.' The attempts at the Conference of the delegations of Egypt and Iraq to eliminate the phrase 'subsequent agreement' was rejected as beyond the competence of the Conference (*U.N.C.I.O. Records*, vol. x, pp. 468–9, meeting of 22 May 1945). Attention was drawn by the Canadian delegation to this fact in the General Assembly (U.N. Doc. A/C.4/SR 39, 1947).

Moreover, the Executive Officer of Commission II at San Francisco (formerly Assistant Director of the League of Nations Mandates Section), writing immediately after the Conference, said of the trusteeship system: 'Its first characteristic is that it is voluntary.' See Gilchrist, 'Colonial Questions at the San Francisco Conference', in *American Political Science Review*, October 1945, p. 988.

[2] 13 December 1946. *Journal*, Gen. Ass. No. 61, Suppl. A–A/P.V./61.

'compulsory' interpretation emphasized the word 'shall' in Article 77 and the qualification in paragraph 2 of Article 80 that the protection of existing rights given by the first paragraph 'shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77'. The South African and other delegations argued that paragraph 2 of Article 80 could not invalidate paragraph 1 of the Article; nor could it alter the voluntary character of trusteeship established by the other Articles. Some delegates, relying mainly on Article 80 (2) (and the vague assumptions which were no doubt made at the San Francisco Conference that mandates and ex-enemy 'overseas' territories were not going to be annexed but would be submitted to trusteeship), held that since the word voluntary was used only in category '*c*' of Article 77 (1) ('territories voluntarily placed under the system'), therefore all territories in category (*a*) ('territories now held under mandate') and category (*b*) ('territories which may be detached from enemy states as a result of the Second World War') *must* be submitted to trusteeship.

It is clear from the San Francisco records that to placate opposition to the voluntary theory the Conference deliberately accepted the compromise formula of Article 80 (2) which seems to contradict the optional language of Articles 80 (1), 75, and 77. It left the future to take care of this inner contradiction. But an obligation of such importance would have to be created by clear language, not the vague phrases of Article 80 (2). The permissive language of Articles 75 and 77 is incompatible with intent to create an obligation. The attempt of some delegates to support the compulsory theory by citing Article 103 of the Charter simply begged the question, for it can only apply in cases where the Charter has created an obligation.[1]

Any compulsory application of trusteeship to a whole category involved decisions on all the territories falling into that category. When the Charter came into force on 24 October 1945, 'territories now held under mandate' included Transjordan and Palestine. It could not have been foreseen that neither of them would be brought under trusteeship. The argument that the Charter intended that trusteeship agreements should be submitted for all ex-enemy territories not only runs foul of common sense but also ignores the agreement made at the Yalta Conference which the San Francisco Conference took as its working basis. It was agreed at Yalta that no decisions on individual territories were to be made by the Conference. Such decisions were regarded as the business of the Governments 'having responsibility', as Article 107 of the Charter puts it, for action in relation to enemy states arising out of the war.[2] Not even the Governments concerned could foresee what the decisions would be. They might include annexation, condominium, trusteeship, or international régimes of other sorts. Thus Russia 'assumed responsibility' (the phrase of Article 73 of the Charter) for the Kuriles when these were 'handed over' by the Yalta Agreement. The Dodecanese Islands were territories 'detached from' an enemy state; by Article 14 of the Italian Peace Treaty the Islands were demilitarized and ceded to Greece 'in full sovereignty'. On the other hand, the same Peace Treaty established an international régime (with trusteeship features) for Trieste—which was territory 'detached from' the same enemy state. Under the Cairo Declaration of 1943 'restoration' was the formula used for territories 'stolen' by Japan, such as Formosa. Independence rather than the proposed trusteeship is probably to be the lot of Korea. References in the debates to Soviet annexations of various European territories were countered by the citation of Article 107 of the Charter. But this reply in effect exploded the argument for compulsory trusteeship for ex-enemy territories as a category. In short, the Charter, like the Covenant of the League of Nations, is a constitution, not a prophetic book in which political decisions of the unknown future can be discerned.[1]

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[1] Article 103 reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[2] For the Yalta decision see Great Britain Miscellaneous No. 6 [1947]. Article 107 of the Charter reads: 'Nothing in the present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorised as a result of that war by the Governments having responsibility for such action.'

The Ethiopian delegation placed on record at San Francisco its 'understanding' (which was certainly widely shared at the Conference) that the Conference had 'unanimously agreed that the trusteeship system involves (1) no decision on specific ex-enemy territories, and (2) in no way prejudices the right of any member of the United Nations to lay claim to and acquire or re-acquire in full sovereignty any territories which may be detached from enemy states as a result of the present war.' (*U.N.C.I.O. Records*, vol. x, pp. 499–500. See also ibid., p. 546.)

South Africa was thus, it would seem, within its formal legal rights in deciding not to submit a trusteeship agreement for South-West Africa. It has to be remembered that the Union has not claimed full sovereignty over the territory. It has agreed to administer South-West Africa in the spirit of the mandate and to continue to forward to the United Nations an annual report. Such a report was in fact examined by the Trusteeship Council at its Second Session. The Council formulated on it a series of questions which might have been less numerous if a representative of the Union Government could have been present. The situation is anomalous, but given goodwill on both sides there is no reason why it should not be possible to serve the essential purposes of trusteeship as stated in the mandate.

H. DUNCAN HALL.

THE BELLIGERENCY OF THE MANDATED TERRITORIES DURING THE SECOND WORLD WAR

THE entry of the mandated territories into the Second World War, their inclusion in the Peace Treaties, and the winding up of the mandate system, all present some points of legal interest. As regards the Peace Treaties, it is perhaps sufficient to note that a treaty terminating the state of war between His Majesty and an Axis Power (e.g. Italy) applies to all dependent territories under the jurisdiction of His Majesty's Government in the United Kingdom, including territories under mandate or trusteeship. The fact that technically the state of war had still not been terminated at the time of the transfer of the mandates to United Nations trusteeship does not appear to have been raised except in the case of the Japanese mandates. Here a change of the mandatory Powers was involved, and it was contended that this should have awaited the making of a peace treaty with Japan.

The inclusion of all the League mandates in the League's sanctions against Italy in 1935–6 was a prelude to their role in the war.[2] In September 1939 the British, French, Australian, New Zealand, and South African (and nine months later Belgian) mandates were involved in the belligerency of their respective mandatory Powers. At its final

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[1] The listing of territories was one of the rejected alternatives of 1919. President Wilson's Fourth Draft of the Covenant listed, *inter alia*, Armenia, Kurdistan, and Arabia, none of which were to become mandates.

[2] *Minutes of First Session of Committee of Experts*, 27 November–12 December 1935: League of Nations, *Official Journal*, Special Supplement No. 147. See ibid., Special Supplement No. 150 (1936), for the replies of governments.

Session in December 1939 the Mandates Commission, being engaged on the discussion of the annual reports for 1938, 'deliberately refrained', as it put it, 'from anticipating the events of 1939'. Questions by some members of the Commission to accredited representatives revealed uneasiness as to the legal point involved in belligerency. 'Everyone knew', Lord Hailey pointed out, 'that the mandated territories had been treated as involved in a state of belligerency', and if there was any doubt as to the propriety of such an act from a legal point of view the matter should be discussed at once, and not in a year's time. Professor Rappard expressed the view that mandates were 'not under the sovereignty of the belligerent Powers; the latter administered them in the name of the League of Nations, which was not at war'.[1] But the League had never claimed sovereignty, nor would the mandatories have admitted any such claim. They were charged by their trust with the defence of their mandates, which proved to be as much liable to attack as any portion of their own possessions. Their action was no doubt guided by the view that '. . . the mandatory is entitled, subject to the fundamental principles of the regime of mandates . . . , to extend to the mandated territory his relevant war legislation . . .'.[2] An important decision of the Supreme Council in 1919, bearing on the question of automatic belligerency, had slipped out of the record and was not apparently known when these words were written nor when the relevant legislation was drafted. It was brought to light again by the recent publication of the Paris Conference records by the United States State Department.[3] The Supreme Council decided on 9 December 1919 that the words 'defence of territory' in Article 22 and in the text of the 'B' mandates should be interpreted in the sense of permitting military training of the natives for use for defence purposes outside the territory in the case of general war.[4] The interpretation was in general terms and applied to all the 'B' mandates. But it arose out of a discussion of the desire of France to have this right made clear. In the text of the two French mandates, after the clause common to all the 'B' texts permitting the training of natives 'for the defence of the territory', a clause was inserted as follows: 'It is understood, however, that the troops thus raised may, in the event of general war, be utilised to repel an attack or for the defence of the territory outside that subject to the mandate.' The approval of the United States Government of an interpretation of Article 22 in this sense was indicated to the Supreme Council on 10 January 1920.[5] An 'understanding' of a clause in the Covenant valid for one League Member but not another would have been an anomaly even if this decision had not been on record. Since the words of Article 22 'for defence of territory' applied to the 'C' as well as to the 'B' mandates, the interpretation would seem to be valid also for the 'C' mandates.[6]

The Mandates Commission at its third session in 1923 had ruled that the use even of volunteer troops outside the territory would be a violation of the 'B' mandates other than the French. This interpretation would appear to be untenable. It was not accepted by the Governments, though in practice they deferred to the wishes of the Commission.[1]

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[1] *Permanent Mandates Commission, Minutes*, 37 (1939), pp. 120–2.

[2] Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1940), p. 192.

[3] *U.S. For. Rels.: Paris Peace Conf.* 1919, vol. ix, pp. 542–4 and 836.

[4] Article 22 has 'defence of territory' in the English text, and 'la défense du territoire' in the French. The 'B' mandates read 'the defence of the territory', whilst the 'C' mandates read 'the local defence of the territory'. All the mandates permit the raising of native defence forces. Except in the case of Palestine they do not restrict such forces to volunteers, as do the Charter (Art. 84) and the Trusteeship Agreements.

[5] Under the Neutrality Act of 4 November 1939, the 'B' and 'C' mandates were regarded as belligerent countries, whereas the 'A' mandates were not so regarded. See U.S. Dept. of Commerce, Bureau of Foreign and Domestic Commerce, *Comparative Law Series*, vol. iii, No. 5, May 1940, p. 284.

[6] Moreover, the mandatory was empowered to administer a 'C' mandate as an 'integral portion' of his own territory. The Trusteeship Agreements support the interpretation of the Supreme Council.

In the case of several of the mandates (e.g. Palestine and Tanganyika) troops recruited from the native population on a voluntary basis took part in military operations outside their territories.

The process by which the territories under British mandate were involved in belligerency may be illustrated in the case of Tanganyika. Jurisdiction in that territory was acquired by the Tanganyika Order in Council of 22 July 1920, made under the Foreign Jurisdiction Act of 1890. Section I of that Act provided:

> '(1) It is and shall be lawful for Her Majesty, the Queen, to hold, exercise and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.'

All the dependent territories, including those held under mandate, within His Majesty's jurisdiction were involved in the war between His Majesty and Germany. The procedure adopted was the same for mandated territories as for colonies and protectorates. The Colonial Office circular telegram dated 3 September 1939 announcing the existence of a state of war with Germany was addressed to all colonies, protectorates, protected states, and mandated territories. All the territories had received specimen legislation drawn up in advance in case of war. The Emergency Powers (Defence) Act of 24 August 1939 empowered His Majesty's Government in the United Kingdom to direct by Order in Council that the provisions of the Act should 'extend, with such exceptions, adaptations and modifications, if any, as may be specified in the Order' to overseas territories including 'any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Majesty, and is being exercised by His Majesty's Government in the United Kingdom'. By the Emergency Powers (Colonial Defence) Order in Council of 25 August 1939 the provisions of the Act were extended to overseas territories, including those under United Kingdom mandate. The Order gave the Governors of the mandated territories (and the High Commissioner for Palestine) as ample power as that possessed by the United Kingdom Government to make local defence regulations. The local legislatures also had the power, possessed equally by colonies, to legislate by ordinance, and this method was used to deal with trading with the enemy.

In the case of Transjordan, however, war legislation appears to have been made by the Government of the territory in accordance with powers conferred by local statute. The Emergency Powers (Defence) Act was not applicable to the territory, since it was under an independent sovereign, bound to the United Kingdom by treaty of alliance (Treaty of February 1928).

Professor Norman Bentwich has noted that 'at the outbreak of war with Germany the High Commissioner of Palestine issued a proclamation that Great Britain was at war, but no proclamation was issued by him that Palestine was at war'.[2] War measures were, however, applied, and when Italy declared war Palestine was involved in direct military operations. Syria from the outbreak of the war was an important French base, and a large French army was stationed there which included native levies. In June

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[1] *P.M.C. Min.* 3 (1923), pp. 196–7; also *L.N. Documents*, C.519 (1), 1923, vi, and C.317, 1926, vi.

[2] This *Year Book*, 21 (1944), p. 164.

1941, when the Axis powers began to use bases in the territory, it was invaded by the British Commonwealth and Free French forces from Palestine. League mandates were thus involved in the belligerency of the mandatory, despite the vague flavour of neutralization that clung to a mandate. The defence clauses of the Charter (Arts. 82–4) dissipate any idea of neutrality for a trust territory in any war engaged in by an Administering Authority in accordance with the collective security system of the Charter, including its own self-defence.

H. DUNCAN HALL.

HUMAN RIGHTS IN THE PARIS PEACE TREATIES

THE Peace Treaties with Italy, Roumania, Bulgaria, Hungary, and Finland[1] came into force on 15 September 1947. Within a fortnight three of them became the subject of violent controversy before the Security Council. The conflict arose over the applications submitted by Roumania, Hungary, and Bulgaria for membership of the United Nations and revolved round the interpretation to be given to certain political provisions, namely, the human rights clauses, written into the Peace Treaties. Within the Council the differences of opinion remained unresolved; outside it they continued in the form of diplomatic protests.

The object of this Note is (1) to survey those substantive and procedural provisions of the Treaties which have a direct bearing on human rights, (2) to indicate the conflicting trends of interpretation, and (3) to suggest possible methods of co-ordinating the human rights clauses of the Treaties with those of the Charter.

(1) Each of the five Treaties contains a 'general clause' whereby the enemy state concerned undertakes to 'take all measures necessary to secure to all persons under its jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting'.[2] Another rule common to all five Treaties provides that none of the enemy states must permit in future the existence and activities of organizations of a fascist type whose purpose it is to deprive the people of their democratic rights.[3]

Measures taken in accordance with the Armistice Agreements to set free (irrespective of citizenship and nationality) all persons held in confinement on account of their activities in favour of the United Nations, or because of their sympathies with them, or because of their racial origin, must be completed. All discriminatory legislation (and the restrictions imposed under it) must be repealed and no measures must be taken, or laws enacted, in future that would be incompatible with these principles.[4] Roumania and Hungary have given specific undertakings that their laws will not, either in content or in application, discriminate between their respective nationals on the ground of their race, sex, language, or religion, whether in reference to their persons, property, business, professional, or financial interests, status, political or civil rights, or any other matter.[1] With reference to the former Italian territories transferred to them, France and Yugoslavia have given an undertaking in the terms of the 'general clause'. The latter is also enshrined in the Permanent Statute of the Free Territory of Trieste, with the important addition that no citizen of the Free Territory must be deprived of his civil or political rights, except as judicial punishment for the infraction of penal laws, and that all citizens shall be equally eligible for public office.[2]

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[1] The following abbreviations will be used: I.T.: Peace Treaty with Italy; R.T.: Peace Treaty with Roumania; B.T.: Peace Treaty with Bulgaria; H.T.: Peace Treaty with Hungary; F.T.: Peace Treaty with Finland; all of 10 February 1947.

[2] Art. 14, I.T.; Art. 3 (1), R.T.; Art. 3, B.T.; Art. 2 (1), H.T.; Art. 6 (1), F.T.

[3] Art. 17, I.T.; Art. 5, R.T.; Art. 4, B.T.; Art. 4, H.T.; Art. 8, F.T.

[4] Art. 4, R.T.; Art. 4, B.T.; Art. 3, H.T.; Art. 7, F.T. In the case of Italy, the Treaty does not say more than that Italian nationals, including members of the armed forces, must not be prosecuted or molested solely on the ground that, during the war, they expressed sympathy with the Allies or took action in support of the Allied cause.

In all matters concerning the execution and interpretation of the Peace Treaties (including the human rights clauses), the Allied and Associated Powers will be represented for a period not exceeding eighteen months from the date of the coming into force of the Treaties, by the Heads of the Diplomatic Missions in the enemy capital concerned of the Principal Allied Powers;[3] *acting in concert*, these will give the enemy governments such guidance, technical advice, and clarification as may be necessary to ensure the rapid and efficient execution of the Treaties 'both in letter and in spirit'. To the Heads of the same Diplomatic Missions will be referred (without any time limit) all disputes concerning the interpretation and execution of the Treaties which may not be settled by direct diplomatic negotiations. If the Heads of the Diplomatic Missions, acting in concert, fail to resolve a dispute within two months and the parties do not agree upon another means of settlement, either party can request that the dispute be referred to a Commission composed of one representative for each party and a third member (being a national of a third country) selected by mutual agreement. Failing such agreement within a month, either party may request the Secretary-General of the United Nations to make the appointment. The Commission decides by majority vote; its decisions are final and binding on the parties.

In the case of the Free Territory of Trieste, the protection of 'the basic human rights of the inhabitants' is the responsibility of the Security Council.[4]

(2) Applications for membership of the United Nations were submitted by Italy, Roumania, Bulgaria, and Hungary even before the date of the coming into force of the Peace Treaties; Finland applied four days after that date. The first four applications were considered by the Membership Committee of the Security Council early in August 1947, and by the Security Council itself at its meetings of 18 and 21 August, 25 and 29 September, and 1 October 1947. The British and United States delegations complained of violations of the human rights clauses by Roumania, Bulgaria, and Hungary already at the meetings held prior to the date of ratification, but the applications were then rejected for a different reason: the Soviet delegation had taken up the position that no enemy state was eligible for membership before the Peace Treaties were ratified.

At the meetings held *after* 15 September 1947,[5] the Roumanian, Bulgarian, and Hungarian applications were disallowed (despite the support given to them by the representatives of the Soviet Union and Poland) because of formal objections taken by the United States and the United Kingdom on the ground that, in view of the persistent violation of the human rights clauses, one of the conditions of admission laid down in the Charter (ability and willingness to carry out international obligations) could not be presumed in favour of these three states.[1]

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[1] Art. 3 (2), R.T.; Art. 2 (2), H.T.

[2] Arts. 4 and 5 of the Permanent Statute.

[3] As used in this Note, the term 'Principal Allied Powers' means: in relation to *Italy*: the Soviet Union, the United Kingdom, the United States of America, and France; in relation to *Roumania, Bulgaria, and Hungary*: the Soviet Union, the United Kingdom, and the United States of America; in relation to *Finland*: the Soviet Union and the United Kingdom.

[4] Art. 2 of the Permanent Statute. The *Report* (Doc. E/CN.4/53 of 10 December 1947) of the *Working Group on Implementation* set up during the Second Session of the United Nations Commission on Human Rights rightly stresses the point that this particular responsibility conferred on the Security Council has established a noteworthy precedent for treaties, distinct from the Charter, assigning to organs of the United Nations functions for which the Charter does not specifically provide.

[5] *Verbatim Records of the 204th, 205th and 206th Meetings of the Security Council*, Docs. S/P.V. 204–6.

The following breaches of the human rights clauses were complained of in particular:

In the case of Roumania: 'mass man-hunts' and arrests of democratic opposition elements; imprisonment of some 2,000 of these; the outlawing and progressive obliteration of the principal political party; and, generally, 'an increasing disregard shown during the past two years for human rights and fundamental freedoms'.

In the case of Bulgaria: assumption by the Government of sweeping dictatorial powers; effective denial to the people of their fundamental human rights; systematic elimination of opposition deputies from political life; arrest of opposition leaders on political grounds; dissolution of the Agrarian Union Party; trial and execution of the Agrarian leader Nikola Petkov.[2]

In the case of Hungary: the systematic undermining by a minority party of democratic processes and of civil rights and liberties; use of the police in the service of party power and as an instrument of political coercion; increasing suppression of the freedoms of expression, press, political opinion, and assembly; intimidation of the organized political opposition; brutal assaults on opposition leaders, many of them having been coerced into silence or exile; flagrant irregularities in the parliamentary elections of 31 August 1947.

In relation to these complaints, the attitude of the Soviet delegation was as follows:

In the case of Roumania: the Governments of the United States and the United Kingdom, unable to accept the internal situation in Roumania, seem to consider that intervention from the outside is necessary; the Soviet Government cannot, in any circumstances, agree that without any justification the Allied Powers, or any Powers, should interfere in the internal affairs of Roumania.

In the case of Bulgaria: the United States still considers it normal that a state should intervene in the internal affairs of other states, including states with which Peace Treaties have been concluded; in the view of the Soviet Government it is not the affair of any foreign country to tell Bulgaria how to organize her political life, the relation between parties, and her economic affairs.

In the case of Hungary: the United States and, evidently, others have their own ideas of what human rights are and whether or not those rights are being violated or observed; the Soviet delegation is unable to agree with the criteria put forward in that respect. The Soviet Government rejects attempts to bring about the intervention of other Powers in the internal affairs of Hungary.

The arguments of the Soviet delegation were fully supported by the Polish delegation which, in relation to Roumania, declared with some emphasis that 'the question of the manner in which a country fights for its internal security is entirely an internal problem of that country', and, in the case of Bulgaria, drew attention to the draft Constitution of that country which solemnly proclaimed the equality of the people and the freedoms of press, assembly, and speech, and in which private enterprise, property, labour, and savings were fully protected.

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[1] No complaint was raised by any member of the Security Council against the human rights régime of Italy and Finland; their admission was, however, vetoed by the Soviet Union on the ground that the enemy states could only be admitted as one inseparable group.

[2] France, who voted *for* the applications of Roumania and Hungary on the grounds that she favoured the principle of universality and a better numerical representation for Europe in the United Nations Organization, voted *against* the admission of Bulgaria as a protest against the Petkov trial.

(3) The legal character of the clauses relating to human rights is fairly clear. They belong to that exceptional category of conventional rules which seek to confer rights upon the subjects[1] of a Contracting Power and to impose certain duties upon its organs of government. In the case of the provisions now under consideration, these rules do not purport to be self-executory. The Treaty texts make it clear that the rights sought to be conferred upon persons under the jurisdiction of the enemy states are not created by the Peace Treaties themselves and that, in so far as these rights did not exist when the Treaties came into force, they will have to be established by subsequent municipal legislation. The controversy indicated in the preceding paragraph reduces itself largely to the question whether the governments of the enemy states should be sole judges of the municipal measures necessary to give effect to the human rights clauses, or whether those measures (legislative and executive alike) should be open to the scrutiny of the Allied and Associated Powers.

The view taken by the Soviet Union and Poland seems to be contradicted by the general rule of interpretation whereby 'it is to be taken for granted that the parties intend the stipulations of a treaty to have a certain effect and not to be meaningless'.[2] If the governments of the enemy states were to be sole judges of the municipal measures necessary to give effect to the human rights clauses, those provisions of the Peace Treaties which set up special machinery for the settlement of disputes would (in relation to those clauses) be meaningless; in fact, the human rights clauses would have no sanction whatsoever. Neither the text of the Treaties, nor the Transactions of the Peace Conference, suggest that such was the intention of the victorious Powers. On the other hand, the view that the Allies are entitled to scrutinize the municipal measures of the former enemy states is strongly supported by the *travaux préparatoires* and, particularly, by a Report of the Legal and Drafting Commission[3] which laid particular emphasis on the point that the special procedure provided by the Treaties for the settlement of disputes also covered the interpretation and application of the human rights clauses.

Assuming now that this right of the Allied and Associated Powers is well founded,[4] there arises the problem of how the standards applicable to the human rights régime of the former enemy states should be determined. The text of the Treaties gives little guidance. It contains no exhaustive list of human rights and fundamental freedoms. Freedom of expression, of press and publication, of religious worship, of political opinion, and of public meeting are mentioned by way of exemplification; but even the content of these specific freedoms is left undefined. That this silence is the result of a deliberate policy is clear from an observation of the United States delegation to the Peace Conference,[1] in which the view was taken that

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[1] No machinery is provided by the Treaties for the scrutiny of, and action upon, petitions that might be submitted by individuals, groups, or associations with reference to the human rights régime of the enemy states. In its *Report* (see n. 4, p. 393, *supra*) the *Working Group on Implementation* suggested that the Economic and Social Council should set up a Standing Committee for the purpose, *inter alia*, of receiving petitions concerning human rights. The question whether the competence of the Standing Committee ought to be confined to infringements of the Convention (or Conventions) on Human Rights, or include other treaties (notably, the Peace Treaties of 1947) also, was referred back to the Secretariat, as the Group found that this point was bound up with complex and difficult legal problems which it was not in a position to examine.

[2] Oppenheim, *International Law*, vol. i (6th ed. by Lauterpacht, 1947), p. 861.

[3] Annex to the *Report of the Political and Territorial Commission for Finland*.

[4] In case of a continuing conflict of views on this fundamental point (see p. 394, *supra*) it may yet prove necessary to seek authoritative clarification through an Advisory Opinion of the International Court of Justice. True, the Peace Treaties do not themselves provide for the reference of legal disputes to the Court; but the Security Council, where the controversial point of interpretation first arose, would be clearly within its rights if it called for an Advisory Opinion under Art. 96 of the Charter.

> '. . . a particularisation of the human rights and fundamental freedoms is undesirable since they cannot all be enumerated in the draft treaty and omissions may lead to confusion with respect to the intent of the drafters.'

The wisdom of this policy is not perhaps beyond doubt. The Peace Conference provided an historic opportunity for the Allies to impose upon the defeated enemy precise obligations in regard to human rights; that opportunity was missed. Admittedly, it was not an easy one to seize, considering the fundamental divergencies of Western and Eastern ideas about the content of both political and economic freedoms. It is none the less regrettable that even 'the intent of the drafters' was left untold; in that respect the *travaux préparatoires* are as obscure as the Treaty texts are vague. This unsatisfactory position is further aggravated by the absence (except in the case of Trieste) of any tangible connexion between the human rights clauses of the Treaties and those of the Charter; likewise, there is no link between the Treaty procedure for the settlement of disputes and the machinery of the United Nations, apart from the proviso that, under certain conditions, the 'third member' of an arbitrating Commission may be appointed by the Secretary-General. Unless such a link is forged (or until the human rights clauses of the Peace Treaties are replaced by a Convention on Human Rights accepted by both the victorious and the defeated Powers), there will be an ever-present danger that conflicting standards of human rights may be developed through the organs of the United Nations on the one hand and the enforcement machinery of the Peace Treaties on the other.

That risk could be lessened considerably if the Allied and Associated Powers were to take the view that Article 56 of the Charter admitted of an extensive interpretation calculated to establish an organic connexion between the Treaties and the machinery of the United Nations. Under Article 56 'All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55'. One of the purposes set forth in Article 55 is the promotion of 'universal respect for, and observance of, human rights and fundamental freedoms'. It is at least arguable that, when an Allied or Associated Power (being a Member of the United Nations) makes a formal complaint against the human rights régime of a former enemy state, it takes (in the meaning of Article 56) 'separate action' for the achievement of one of the purposes set forth in Article 55; and that, similarly, the Principal Allies are taking 'joint action' when they instruct the Heads of their Diplomatic Missions to resolve a dispute on human rights or appoint a representative to a Commission assuming jurisdiction in a dispute. From such an extensive interpretation it would logically follow that no Allied or Associated Power ought to make a formal complaint and, further, that neither the Heads of Diplomatic Missions nor any arbitrating Commission ought to decide on a dispute involving human rights, without previous consultation with the appropriate United Nations organs and, in particular, the Economic and Social Council and the Commission on Human Rights.[2]

If these principles were to be admitted, there would arise the further question whether the appropriate United Nations organs ought not to call for an Advisory Opinion of the International Court of Justice in all cases where a distinct breach of a Peace Treaty obligation is alleged. The historical record makes it quite clear that the majority of the delegates at the Peace Conference were anxious to refer to the Court *all* disputes which could not be settled by direct diplomatic negotiations.[1] The proposed link between the Treaties and the Court was only eliminated by the Council of Foreign Ministers after, and against the sense of, the Peace Conference. That link could be restored through Article 56 of the Charter—at any rate, in a field limited to human rights and to the extent of Advisory Opinions.[2]

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[1] *Report of the Political and Territorial Commission on Italy.*

[2] In February 1947 the Commission on Human Rights adopted a Report on the subject of implementation in which it laid down the general rule that 'the Commission recognises that it has no power to take any action in regard to any complaints concerning human rights'. This abdication of a crucial function does not, however, exclude *consultation* with member governments.

A close co-ordination of the Peace Treaty machinery with the United Nations (including the International Court) is all the more desirable as the effectiveness of the former (particularly in relation to human rights) cannot be taken for granted. In applying definite standards to any disputed case, the Heads of the Diplomatic Missions must 'act in concert', i.e. reach unanimous decisions. In view of the fundamental differences of opinion which have already emerged in the debates of the Security Council, their ability to do so must be strongly doubted. It is therefore safe to predict that in practice all disputes involving human rights will have to be settled by Commissions. Unfortunately, however, the Treaty provisions dealing with these latter are very sketchy indeed. They are silent even on the vital question whether the Commissions shall proceed administratively or judicially. No judicial (indeed, not even legal) qualifications are required of any member. The assumption that a procedure at least semi-judicial in character is intended rests only on deductions from the competence of the Commissions (which includes the interpretation of treaties and the settlement of disputes), from the requirement of impartiality in the case of 'the third member', and from the 'definitive and binding' effect stipulated for decisions. Again, the draftsmen seem to have accepted the theory that there would never be more than two parties to a dispute.[3] That theory may be realistic in relation to cases where none of the Great Powers is materially interested. It is not necessarily realistic in the case of disputes which revolve round issues of such general interest as the human rights régime of a former enemy state. If, however, not more than two parties are allowed to take part in any proceedings, those among the Allied and Associated Powers which may want either to associate themselves with the complaint or to resist it are left without procedural remedy unless they are prepared to launch fresh proceedings which, in turn, involve not only a duplication of procedural effort, but also the risk of conflicting decisions.[4]

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[1] The British-American-French proposal to this effect was approved at the Peace Conference by 15 votes to 6; the Soviet Union voted against.

[2] The *Working Group on Implementation* set up by the Commission on Human Rights (see n. 4, p. 393, *supra*) came to the unanimous conclusion that the final guarantor of human rights should be an international court. The majority of its members voted in favour of a specialized 'Court of Human Rights'; and there was unanimous support for the proposal that the jurisdiction of this new Court should cover not only disputes referred to it by the Commission on Human Rights, but also 'disputes arising out of Articles affecting human rights in any treaty or convention between States referred to it by parties to the treaty or convention', including, in particular, the Peace Treaties of 1947.

[3] '. . . a Commission composed of one representative of each party and a *third* member selected by mutual agreement of the *two* parties from nationals of a third country': Art. 87, I.T. There are identical provisions in the other four Treaties.

[4] Two possible ways out of this dilemma suggest themselves. The first method would be the incorporation in the Rules of Procedure (yet to be formulated) of a provision corresponding to Art. 63 of the Statute of the International Court of Justice. That, however, would still deny to the intervening state the privilege of appointing a representative of its own to the Commission and at the same time prevent it from launching fresh proceedings in the case of an adverse

Will the enforcement procedure be different, once a former enemy state is admitted to membership of the United Nations? The relevant provision of the Charter[1] declares that

> 'Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorised as a result of that war by the Governments having responsibility for such action.'

It seems to be clear, however, that such disputes involving human rights as are 'likely to endanger the maintenance of international peace and security' will be lifted from the exclusive competence of the Heads of Diplomatic Missions and arbitrating Commissions and become subject to the concurrent jurisdiction of those organs of the United Nations which carry special responsibilities for the pacific settlement of disputes under Chapter VI of the Charter.

One final question remains to be examined. The Peace Treaties have set up machinery which can be invoked for the scrutiny of human rights in cases of dispute; no machinery has been set up for the current scrutiny of municipal measures affecting human rights. As a matter of law, it would appear that such current or 'routine' scrutiny would be within the concurrent jurisdiction of the Allied and Associated Powers *and* the United Nations (whose responsibility for the observance and promotion of human rights is not limited to the territory of its members). As a matter of expediency, however, routine scrutiny should be the responsibility of the United Nations. In the Human Rights Division of the Secretariat a specialized body has already been created for the current recording and analysis of all municipal enactments bearing on human rights; and the setting up of a subsidiary organ or even a specialized agency for their supervision and enforcement (at any rate 'at a later stage in the international development of Human Rights'[2]) is a distinct possibility. To require the Principal Allies to set up machinery of their own for the discharge of similar functions would be an unnecessary duplication of effort.

ANDREW MARTIN.

HOSPITAL SHIPS IN THE SECOND WORLD WAR

IN 1907 Professor Pearce Higgins prefaced an article on Hospital Ships with the remark that 'every war raises fresh problems'.[3] Since he wrote those words the world has seen two major conflicts, and it may be of interest to re-examine the Hospital Ship Convention in the light of recent experience. A reader who views the Convention against a background of naval practice and thought during the last thirty-five years will find

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decision. The second (and presumably more acceptable) method would be to work out a liberal interpretation of the references in the Treaty texts to 'two parties' and 'third member', and to construe these terms purely and simply as references to the basic structure of any dispute. An interpretation of this kind (based on the conception that every dispute is, in essence, a contention between a complaining and a defending side) would lead to the following results: (i) any Allied or Associated Power that may be desirous of intervening, could do so in the capacity of a *party* to the dispute; consequently, (ii) each intervening State would have the right to appoint to the Commission a representative of its own choice; (iii) the chairman (or umpire) would still have to be chosen by mutual agreement from among the nationals of a state not intervening in the dispute, or, failing such agreement, be appointed by the Secretary-General of the United Nations; (iv) the chairman would have a casting vote, regardless of the number of representatives ranged on either side.

[1] Art. 107.

[2] Cf. p. 21 of the *Report of the Working Group on Implementation* (see n. 4, p. 393, *supra*).

[3] In *Law Quarterly Review*, 26 (1910), pp. 408–14.

difficulty in visualizing the objects and outlook of its framers. To them and, even more, to the authors of the Third Convention of 1899 the consequences of warfare at sea were confined to the combatants on either side; they—and they alone—needed the protection conferred by the Convention upon *les malades, blessés et naufragés*. Merchant ships might be liable to seizure in prize; in exceptional circumstances they might be sunk. But, as Professor Pearce Higgins remarked, 'international law, both customary and conventional, requires the Commander of the capturing vessel to provide for the safety of the passengers and crew before destroying the ship'. In 1907 civilians stood safely outside the arena and required neither consideration nor protection in a Convention expressly stated to be intended as an adaptation to maritime warfare of the principles of the Geneva Convention relating to warfare on land.

The framers of Hague Convention No. X had two main contingencies in mind: the first was the old-fashioned fleet action fought at short range with bloody carnage and consequent need for speedy succour to the wounded. Hospital ships were expected to accompany the fleet to sea and wait on the outskirts of the engagement with a view to picking up the wounded and drowning, and accordingly required protection while engaged on their task: thus, too, the obsolete provisions for respecting sick bays look back to the days when they might have been the scene of hand-to-hand fighting. Secondly, the Convention had to provide for the protection of sick and wounded combatant personnel such as might be found on board troopers or merchant ships intercepted by the enemy. Having safeguarded them, its framers had completed their task of giving the sailor the protection to which the soldier was already entitled: they made no provision for the civilian, because none was needed. A correct appreciation of the background to the Convention provides a key to the meaning of much that is vague in its wording and leaves ample scope for a later generation of lawyers to extract from its text a gospel to meet the unforeseen problems of modern warfare at sea—the long-range naval engagement, the U-boat, and the bombing aeroplane. The first consequence of their impact was seen in 1914, since when hospital ships have ceased to accompany the fleet at sea except on somewhat rare occasions, such as the American naval operations in the Pacific in 1944 and 1945: at most they stand by at base ready to take over casualties after the engagement is ended but, in general, they have been relegated to the role of hospital carriers plying between base and base. Hand-to-hand fighting has become a rarity, so that two of the main objects originally envisaged by the Convention are outmoded. At the same time the onset of unrestricted U-boat warfare, followed in 1939 by total war in the air, provided an urgent and unforeseen problem for students of international law and a supreme test of the flexibility of the Convention. As a result, hospital ships began by general consent to undertake the transport of casualties from land warfare—a usage which, if the authority of M. Renault, one of the rapporteurs at the 1907 Conference, be accepted, was not contemplated by the authors of a convention framed to protect the casualties of maritime war.

This extension was followed by a series of attempts to widen its scope even farther, in order to provide for sick and wounded, protected personnel, and medical stores outside the Convention as originally understood. These attempts were based on a wide and benevolent interpretation and received support from high legal authority in England, who expressed the opinion that the Convention ought to be construed in its widest sense so that all ships constructed or adapted solely with a view to carrying aid to casualties were entitled to protection, provided only that no specific provision of the Convention was violated, e.g., by their use for warlike purposes. The whole-hearted adoption of this interpretation was considered and rejected by the British Government as far back as 1916: this decision was supported by technical arguments based on close examination of the precise wording of the Convention and reinforced by the consideration that the Central Powers had a smaller stake in the maintenance of the Convention and were therefore likely to take and enforce a narrow view of its interpretation, with the consequent risk—which was realized when the German Government decided to attack Allied hospital ships—that the Convention would be disregarded. Although this German action was based on unfounded charges relating to the illegal carriage of ammunition and troops, it brought the evolution of the Convention to an abrupt halt, lasting until 1939, in which year the process was resumed and has resulted in a notable broadening of its scope.

Modern interpretation of the Convention has tended to take three main lines. In the first place, there is the temptation—in the face of total war against merchant shipping—to carry the sick and wounded until the last possible moment before restoration to full health, and here there appears to be general agreement, after much conflict of opinion, that it is a breach of the Convention to carry convalescent personnel in hospital ships. At the same time humanitarian considerations led to a close examination of the categories of sick and wounded combatant personnel entitled to claim passage on hospital ships. As noted above, it was early agreed that casualties from the armed forces engaged in land warfare had a proper place on board—a concession which was soon followed by an extension in favour of sick and wounded persons attached to the armed forces generally, whether on land, at sea, or in the air, and later to the sick and wounded wives and dependants of both classes.

A curious anomaly formerly existed in the case of merchant seamen: in some countries they are embodied in the armed forces and casualties are clearly entitled to use hospital ships, whereas in other countries they are still civilians and, on a strict reading of the Convention, not entitled to its protection. The unsubstantial nature of a distinction founded on an accident of domestic law applied to men facing identical risks led in 1943 to an Allied decision at the highest level to permit the carriage of sick and wounded merchant seamen in hospital ships, whatever their status might be by their domestic law.

The sick and wounded civilian has not so far, illogical though it might seem to the framers of the Convention, obtained protection, unless he or she is shipwrecked or falls within the limited categories mentioned above. Thus when the German Government wanted to evacuate refugees from the Baltic States in 1939 in a hospital ship, they rightly removed its markings and operated it as an ordinary liner. It is suggested that, quite apart from the desirability of specifying the classes of casualties entitled to be carried, it is essential as a matter of both logic and common humanity to extend the protection offered by hospital ships to sick and wounded civilians when the Convention is next revised. Sentiment of forty years ago would probably have added that the fit civilian is entitled to immunity from enemy attack whilst at sea, and that if his safety cannot be secured by any other means he should be allowed to travel in a hospital ship. The argument might be taken even further in the case of women, but to the citizens of this atomic age, taught by the experience of two major wars, that—man or woman—the civilian has become a vital part of the military machine, this suggestion will hardly commend itself as practicable. It is axiomatic that in the present state of international law it is essential to preserve some balance between the humanitarian benefit to be gained by an alteration in the law and the military advantage thereby conferred on one of the belligerents: if this balance is seriously disturbed the other side will certainly seek and find a pretext for denunciation. Hence, the most that a revision of the Convention can hope to attain is an extension of its protection to sick and wounded civilians with, at best, a further extension to permit the carriage of fit children.

The second line of advance starts from the fact that it is clearly within the strictest interpretation of the Convention to carry medical and religious staff as part of the ship's company to care for the sick and wounded on board. Ashore, they would have the status of 'protected personnel', and there is now a consensus of opinion that it is legitimate to carry them as passengers, whether they are *en route* to or from the armies in the field or on passage to other hospital ships, and thus give them that protection from deliberate attack at sea to which they are entitled on land. Recent proposals for the abolition of the 'protected' status of religious and medical personnel, if adopted, will clearly undermine the basis of this practice, and any revision of the Convention will have to lay down specific rules on the point.

A third line of advance has been in connexion with the stores which may be carried by hospital ships. Clearly, they may carry medical stores and supplies for use on board: the fact that they usually have a one-way flow of passengers—from the fighting line overseas to base at home—makes it economical to use them to transport medical stores and supplies for the forces in the field on the outward voyage. The precise limits of this right to carry cargo have yet to be determined, but it may be suggested that they lie (*a*) in the fact that only medical supplies and stores may be carried—the carriage of warlike stores would be a clear breach of the Convention; and (*b*) that the carriage of such supplies must be subordinate to the dominant object of the voyage, i.e. to pick up casualties at its destination, so that it would not be a legitimate use of a hospital ship simply to visit neutral ports and there collect medical stores under the immunity afforded by the Convention.

The evolution of the modern hospital ship engaged on the safe carriage of casualties, medical stores, and protected personnel to and from armies overseas from the original concept of a hospital ship attendant on the fleet and ready to succour casualties from an engagement is a striking illustration of the elasticity of this branch of international law in the face of new methods of making war. But the spread of hostilities to merchant shipping, whilst extending its sphere of utility, has also increased the danger from accidental attack.

During the 1939 war additional markings on the sides, stern, and deck of hospital ships to aid identification by day, and illumination at night with a band of green lights on the sides and red crosses on the sides and deck picked out with red lamps, were adopted by common consent and provide a high degree of protection against underwater attack—although errors are not unknown in practice.

The advent of the high-level bomber has, however, provided a problem of an entirely different kind. Existing methods of marking and illumination have proved unsatisfactory even at close range, and objections raised by local military authorities to the presence inside their ports of illuminated ships have added a complication to an already difficult problem. At sea and in port accidental attacks on hospital ships have been all too frequent and the casualty lists heavy. Moreover, in proximity to opposed landings such as that at Salerno the danger of damage from bombing attacks on large concentrations of shipping has proved so great that the claim to immunity normally put forward by the display of markings and illumination has been largely abandoned. Thus, in the invasion of Normandy unmarked and unnotified landing-craft were used to evacuate wounded from the beaches, and they were suitably armed against air attack—more perhaps as a help to the morale of the crew than as a means of effective defence.

The markings prescribed by the Convention clearly require revision and extension on the lines adopted by common consent during the 1939 war. Experiment regarding the best methods of illumination is urgently needed, and recognition ought also to be given to the practice of hospital ships broadcasting their position, course, and speed at regular and frequent intervals to enable enemy intelligence to warn their forces. This practice has proved the best means of ensuring their safety on the high seas, although it is by no means infallible, as the accidental sinking of the German hospital ship *Tubingen* by the Royal Air Force in 1945 demonstrated. It is, however, essential that recognition given either to illumination at night or to broadcasting of position should be permissive and not compulsory, since there are occasions when the tactical situation prevents the adoption of either means of protection. Thus a hospital ship cannot remain illuminated in port, where it might guide enemy bombers to their target, or whilst passing through defensive minefields, when it might betray the swept channels. Similarly, it is imperative that hospital ships should not broadcast when they are following up a landing operation, such as that carried out by the Allies in North Africa, since the convergence of an unusual number of hospital ships on any one point provides a clear indication to enemy intelligence of the approximate timing and location of the landing. During the late war there was general agreement that, although absence of illumination does not deprive a hospital ship of immunity, it must accept the risk of accidental attack and cannot complain if it is mistaken for a legitimate target. In the same way a hospital ship does not, in the general view, forfeit its immunity by lying in proximity to a target: it merely accepts the risk of unintentional—but not, of course, deliberate—damage. The law with regard to the acceptance of escort by a hospital ship is not finally settled. The Allied view is, once again, that a hospital ship does not thereby forfeit its immunity but runs the risk of accidental attack; the German Government enforced the opposite view and considered that by accepting an escort, whether of aircraft or warships, a hospital ship loses the protection of the Convention. Whilst the German view is clearly right if the hospital ship engages in the hostile manœuvres, it is submitted that merely to proceed in company with warships or to accept escort from aircraft ought not to deprive a hospital ship of immunity—after all, the original concept was of a protected ship able to accompany the fleet to sea and be present at an engagement—and in any case there are numerous occasions in modern warfare when escort by a warship is inevitable, e.g. when passing through swept channels.

Accidental air attacks on hospital ships of both sides were not infrequent during the 1939 war, and it has been suggested that some kind of radar recognition device ought to be made available to enable them to signal their identity to attacking planes. This suggestion is attractive, if the technical problems can be overcome, but at the same time its adoption will require careful consideration—if only because of the danger of its abuse by an unscrupulous belligerent. It is, perhaps, fair to say that during the 1939 war the British Admiralty, the United States Navy Department, and the German Naval Command respected the principles of the Convention; such abuses as occurred were authorized at a low level and were corrected when discovered. Despite government statements on both sides there is little evidence to show that attacks on hospital ships were authorized by the respective commands and much to prove that the majority were accidental and due in the main to faulty recognition. There is, however, clear evidence that abuses of the Convention were permitted by some of the belligerents—thus one country has a record extending from the carriage of military pontoons in their hospital ships in 1916 to the transport of healthy women, secret documents, and army general staff in 1941 and 1942, whilst there is a strong suspicion that in another quarter of the globe hospital ships were used as troop transports on the outward voyage and that the protection of the Red Cross was claimed by ships not entitled to it.

The problem of abuse, particularly with the Convention in its existing state, is a difficult one, but even revision and clarification will leave the way of the evil-doer easy to tread. Thus the duplication of a radar warning device would provide a simple means of obtaining immunity for a particularly valuable ship. A possible solution might be found in the manning of the device by an international team of observers—but here again there are difficulties, since no belligerent welcomes neutrals into its ports. Experience has shown that there are black sheep in the most neutral flock, whilst the presence of observers on board notified hospital ships does not touch the main difficulty, i.e. that the device might be copied and used by ordinary merchant ships—or even warships—which would not carry observers.

The danger of abuse—or of undue extension of the Convention—is always prominent to the minds of belligerents and presented itself in a particularly difficult form in connexion with methods adopted to save the lives of airmen shot down into the sea. During 1940 the German Government commissioned more than one hundred fast light craft for air–sea rescue purposes, and also brought into use a number of ambulance aircraft and seaplanes for which they claimed immunity under the Convention and the consequent right to pass unscathed in proximity to the British coastal defences at a time when invasion was believed to be imminent. The use of air–sea rescue craft and air ambulances was clearly a *casus improvisus* to the framers of the 1907 Convention: the German Government put forward a benevolent construction of the Convention and stressed the point, so far as air–sea rescue craft were concerned, that the Convention laid down no limit to the size of a hospital ship and even referred to smaller craft as entitled to protection. The British Government, not unnaturally impressed with the danger that both classes might be used by the enemy for espionage and intelligence work, and strengthened in this view by the capture of an ambulance aircraft which was proved to have been in recent use for ordinary transport purposes, adopted a narrow construction of the Convention and argued that on no view of its meaning could an airman who was shot down into the sea unwounded be regarded as 'shipwrecked'. Adopting an arbitrary lower limit of 3,000 tons, it announced the rejection of all notifications of hospital ships below that figure and refused immunity to all ambulance aircraft. It may be remarked that the United States of America did not adopt the British policy with regard to small hospital ships, nor was it put into effect by the British Government in the Pacific theatre where the danger of espionage was not so pressing, whilst there was an obvious risk of Japanese reprisals against Allied hospital ships. The varying policy affords an interesting illustration of the practical limits which strategic necessity will impose on any movement for an undue extension of the Convention on humanitarian grounds. In practice, the British Government adopted and enforced a somewhat lower limit of 2,000 tons in European waters, despite strong German and Italian protests, and orders were given that air–sea rescue craft and hospital ships which had been refused recognition and all ambulance aircraft were to be captured or destroyed. So far as air–sea rescue craft and ambulance aircraft were concerned, the British Government were within their strict rights; but it is doubtful whether its objection to hospital ships under the 2,000-ton limit was valid, if they were genuinely equipped for the transport of sick and wounded and complied in other respects with the requirements of the Convention. This is so particularly in view of the fact that the Convention itself lays down no limit and that the report of the Second Commission of the 1899 Conference specifically states that 'no special type may be prescribed'. The latter question was the subject of acrimonious correspondence between the British and German Governments and came up for practical determination in the case of the German *Freiburg* of 1,500 tons, which was duly notified as a hospital ship by the German High Command and was rejected by the British Government. She was intercepted in the Adriatic by British forces and was found on examination to be fully equipped as a hospital ship, with the result that it was decided to release her—an admission that the German view was correct.

The conflict between the desire to provide speedy succour to wounded or drowning airmen, on the one hand, and the danger not only of espionage but also of bringing the protection afforded by the Red Cross into disrepute by an undue multiplication of claimants to immunity, is a real one. Fortunately, there seem to be prospects of a solution along the lines already adopted by the British Government—a solution which would leave the fast air–sea rescue craft to rely on their speed for safety and make them liable to capture or attack if found within range of the enemy defences; whilst the small inshore hospital ship or carrier would depend on the protection of the coastal defences. The fixing of the precise lower limit may present some difficulty, but the solution is, it is suggested, one which accords with the original concepts of the framers of the Convention, who thought of the hospital ship as a seagoing ship of some size, and will tend to ensure respect for the fewer and more readily identifiable ships which will remain entitled to immunity.

The possibility of a revision of the Convention in the near future makes the experience in the late war of more than passing interest. Two problems came up for examination on a number of occasions. The first was provided by the notification by the Italian Government of the modern merchant ship *Ramb IV* as a hospital ship at a time when she was blockaded in Massawa and in imminent danger of capture. A second—and closely parallel example—was the notification by the Germans of the *Rostock*, a hastily converted 'Sperr brecher', as a hospital ship in the besieged part of Bordeaux in 1944. On both occasions the ship was intercepted and taken into an Allied port: in the case of the *Ramb IV*, although she was temporarily detained as a reprisal, it was the Allied intention to release her in due course—on the ground that the conversion was genuine and not an attempt to save a valuable ship from capture; it was recognized that, had the conversion merely been effected to avoid capture, the Prize Court would have condemned her as good and lawful prize. The *Rostock* was seized by British and French forces despite vigorous protests by the German Government, who asserted the genuineness of her conversion and stated that she was captured whilst in course of evacuating casualties to a neutral Spanish port. The argument was summarily terminated by the discovery that the ship had orders to indulge in weather-reporting activities and carried codes. While the original problem remained unsolved, the combination involved in the conversion of a warship into a hospital ship with only superficial modifications, the relief to the defenders occasioned by the removal of their sick and wounded, and the advantage to be gained by saving a ship from certain capture all indicated that the German action was straining the Convention to its limits. This and the allied problem of the belligerent who notifies and denotifies his hospital ship to suit the convenience of the moment has lead to suggestions that, once a hospital ship has been notified, it must remain in use as such for the duration of hostilities with the corollary that no hospital ship may be notified in a besieged port. It may, however, be doubted whether these provisions may not prove unnecessarily burdensome to the belligerents. A hospital ship may well prove unsuitable or redundant in five years of war, whilst the belligerent who chops and changes between hospital and merchant ship is already caught by the provision that a hospital ship must be 'solely' adapted for such use, which would not be true of a part-time cargo ship. In any case, a prohibition against denotification is of little practical value: it is undesirable to give the other side a trivial excuse for denouncing the Convention, and the worst which can happen to a ship when it has ceased to be used as a hospital ship is capture or sinking, to which, if the experience of two wars is any guide, it is liable in any event.

Similarly, the prohibition of notification in a besieged port may well prove to be unnecessarily restrictive, and it is considered preferable to judge each case on its merits. The law with regard to a change of flag in similar circumstances is already well settled and its principles would appear to be applicable.

The second practical problem arose with regard to the right of a belligerent to demand the surrender of sick and wounded on board hospital ships. So far as the British Admiralty were concerned, it was much complicated by the reservation made by the British Government to Article 12 of the 1907 Convention. This reservation went back to the incident of the *Deerhound* in the American Civil War: it was founded on the theory that a neutral flag is inviolable and that in consequence a belligerent warship ought not to be allowed to take enemy sick and wounded from a neutral hospital ship. However, British practice during two wars indicates that this theory is dead beyond recall. So far as is known, the 1914 war saw no example of the exercise of this right of capture, and the opinion has been expressed that it is of no practical importance and an unnecessary reversion to barbarism. In 1940, however, and again in later years, the question came up for practical consideration on several occasions. In the first two cases the problem was whether a British hospital ship could be sailed through the Mediterranean, in the second case to remove casualties from Malta, when it must necessarily pass through enemy controlled waters. In each case it was decided that the risk could not be run, since, especially on the second occasion, the enemy were unlikely to permit a substantial relief to the besieged fortress of Malta without exercising their rights under the Convention.

In 1944 and 1945 the Germans decided to pass the hospital ships *Tubingen* and *Gradisca* through the Allied patrol lines in the Adriatic to embark sick and wounded in Salonica. In accordance with the requirements of the Convention the ships were allowed to pass on the outward voyage, but they were diverted to Allied ports on the homeward trip and some 4,000 prisoners were made: a high percentage were only slightly wounded and the great majority were considered likely to be fit for active service within twelve months. This action brought forth no protest from the German Government, who considered it justified by the terms of the Convention. But curiously enough it did not pass without criticism in the higher councils of the Allies—criticism possibly provoked not so much by legal considerations as by the fear that the Japanese might be tempted to initiate similar action against Allied hospital ships in the Pacific theatre. Practical experience shows that a belligerent cannot allow valuable enemy personnel, often comprising technical grades and lightly wounded, to pass through its lines unmolested; and if the Convention is to maintain contact with the realities of war, the Article will have to be retained. Its rigour can, however, be mitigated in accordance with recent British practice by providing that all sick and wounded with a prima facie claim to repatriation under Article 68 of the Geneva Convention should be left on board.

The investment of Salonica by irregular forces also produced a curious example of a claim to asylum. Thus the German Government sought the permission of the British and Swedish Governments to place their sick and wounded on board a Swedish merchant ship, then lying in the port, to ensure their safety until they could be surrendered to the Allied armies, a request which was granted by the British Government on humanitarian grounds.

The limitation imposed on the immunity of a hospital ship by Article 12 is flanked by the right conferred on a belligerent by Article 4 to control the movements of a hospital ship on grounds of operational necessity. Such a situation arose at least twice during the 1939 war, when the German High Command wished to pass a hospital ship through the Allied patrol lines to a besieged part. As noted above, no obstacle was placed in the way of the voyages to Salonica, but when the Germans sought permission to send a hospital ship to Brest—then invested by Allied forces—it was apparent that it could not pass into the port without serious inconvenience to the attacking forces, and it was decided to refuse the request until the tactical situation had clarified.

Against these limitations on its freedom, a hospital ship has important rights. In the first place, it may not be deliberately attacked, and by Article I it is also given immunity from capture whilst hostilities last. On the whole, these rights were respected during the 1939 war. The seizure of the *Ramb IV* and the *Rostock* have already been mentioned, and to them must be added the capture of the Dutch hospital ship *Op Ten Noort* by the Japanese forces on the ground that it took part in hostile acts against them—a ground which, if it had been proven, would have fully justified the Japanese action. Against these three instances can be set the fact that the Allies released various Axis hospital ships even after they had, in some cases, been taken to an Allied port for search and removal of the sick and wounded on board—as, in one case, was a French ship captured by the Germans.

It is pleasant to be able to recall that in this field international law has not only held its own but has steadily evolved to meet the problems of modern war. The 'fresh problems' prophesied by Professor Pearce Higgins have been numerous and, although many of them have been solved, there is an urgent need for revision of the Tenth Hague Convention in the light of modern experience. It is hoped that this Note will focus attention on some of the more pressing problems.

J. C. Mossop.

THE BELIZE CONTROVERSY BETWEEN GREAT BRITAIN AND GUATEMALA

An Anglo-Guatemalan Convention was concluded on 13 April 1859 (and duly ratified by both parties), one Article of which delimited the frontier between Guatemala and the British settlement and possessions in the Bay of Honduras as they existed previous to and on 1 January 1850. By another Article (VII) the two parties undertook jointly to construct a means of communication between the capital of Guatemala and the fittest point on the Atlantic coast near the settlement of Belize. For various reasons Article VII has never been implemented. As soon, however, as the Convention of 1859 had been signed, the British Government made efforts to carry out their part of the mutual obligations under this Article. In 1860 an officer was sent to survey the proposed road and estimate the cost, and a supplementary Convention was signed in 1863 under which the British Government were to pay £50,000 as full and entire discharge of their obligation as successive stages of the road were completed. The Convention was to be ratified within six months, but when this period expired Guatemala applied for a year's extension, and it was not until 1866 that the Guatemalan Government was ready to ratify. It then proposed two clarifications not acceptable to the British Government. Accordingly, the Convention of 1863 never came into force.

In the British view, since 1863 Guatemala has taken no steps to carry out the obligations incumbent on her under Article VII, although in 1908 she completed on her own responsibility and without consultation with the British Government a railway from Guatemala City to the sea at Puerto Barrios (a Guatemalan port on the Caribbean, some 150 miles from Belize). On the other hand, Great Britain made various proposals for the purpose of implementing its provisions. Thus in 1895 she made an offer to pay £50,000 towards the cost of a railway from Belize to the frontier of the Guatemalan Province of Peten. In 1934 she offered to build a road from Belize to the frontier of the Guatemalan Province of Peten, and in 1936 made a fresh offer to pay £50,000. Guatemala rejected these offers, as well as two proposals made by the British Government in 1940 to refer the dispute to arbitration.

The Guatemalan contentions (as shown, *inter alia*, in a decree passed by the Guatemalan Parliament) are as follows:

(1) It is solely the fault of Great Britain that Article VII has never been implemented and the attitude of Great Britain is tantamount to repudiation of its obligations under that Article;
(2) As a result of the (alleged) repudiation of Article VII by Great Britain, Guatemala is entitled to and in fact does declare the whole Convention of 1859 to be null and void, including therefore the provisions of Article 1 defining the boundaries between British Honduras and Guatemala;
(3) The Convention being as alleged now null and void, Guatemala is entitled to claim the whole of British Honduras, or alternatively the southern part of the colony lying between the Sibun and Sarstoon rivers as Guatemalan territory, on the ground that Guatemala is the international successor of Spain to whom the territory formerly belonged.

Great Britain disputes all of these three contentions of Guatemala. As regards contention (1), the British Government maintain that they are not solely, or even mainly, to blame for the fact that Article VII has not been implemented up to the present date. In any case, Great Britain, so far from repudiating the Article, is still prepared to consider means of implementing it. As regards contention (2), even if the British Government had been solely responsible for the failure to fulfil Article VII of the Convention (which, as indicated above, is not the case), the result would not be to invalidate the Treaty but merely to provide Guatemala with a valid claim against the British Government for non-fulfilment. As regards (3), even if the Convention were invalid (and, as indicated above, in the view of the British Government that is not the case), Guatemala would have no right to the territory of British Honduras or any part of it. Guatemala was not the sole successor to Spain in this part of the world, but only acquired as a successor to Spain that territory over which the new Guatemalan State in fact exercised jurisdiction. Great Britain had been in possession of the territory of British Honduras not merely long before the conclusion of the 1859 Convention, but also before the achievement of Guatemalan independence in 1821.

In a Note of 24 September 1945 the Guatemalan Government announced their wish to resume negotiations on the Belize question suspended by them on account of the war, but, contemporaneously with this, passed legislative decrees and included provisions in the Guatemalan Constitution which in effect declared that the territory of British Honduras was Guatemalan on the grounds indicated above, and in effect requested negotiations on the basis that the Guatemalan legal contentions were accepted. The British Government took the view that the Guatemalan contentions as set forth above and the British contentions in reply indicated clearly that there was a dispute of a legal character between the two Governments. Accordingly, the British Government took steps to invest the International Court of Justice at The Hague with jurisdiction to decide claims against Great Britain in respect of British Honduras if Guatemala (or, indeed, any other state) chose to bring a claim before the Court and itself accept the jurisdiction of the Court for this purpose. The British Government took this step by means of a declaration dated 14 February 1946, under Article 36 (2) of the Statute of the Court (the so-called Optional Clause), deposited with the Secretary-General of the United Nations. They informed the Guatemalan Government of the steps they were taking and the reasons therefor in a Note presented on 14 January 1946.

The Guatemalan Government have not so far availed themselves of the opportunity thus given to them to obtain a legal decision of the highest international tribunal on the claims which they have made against Great Britain in respect of British Honduras. The Guatemalan Government in Notes of 22 January and 13 June requested the British Government to agree that the Court should not decide the matter in the ordinary manner in which cases submitted to the Court are decided, i.e. on the basis of international law, but that the Court should be invested with a special power (which the Statute of the Court provides can be done by agreement) to decide the case *ex aequo et bono*. The British Government, in Notes of 11 March and 10 October, declined to accept this proposal. The predecessor of the Court, the Permanent Court of International Justice, was never expressly empowered by the parties to decide a case *ex aequo et bono*, though the Statute of the old Court provided for this possibility. (In the dispute between France and Switzerland concerning the régime of the Free Zones a bare majority of the Court declined to find that the somewhat vaguely drafted arbitration agreement conferred upon the Court the power to decide the dispute *ex aequo et bono* in derogation of the rights of Switzerland: Order of 19 August 1929, Series A, No. 24.) The view which probably underlay the British attitude was that the *ex aequo et bono* procedure is regarded as being most exceptional and not often to be adopted; to give the power to the judges to decide a case *ex aequo et bono* may mean that the Court is thus given power to override the legal rights of the parties established by international law. The British Government saw no reason why they should agree to give the Court this exceptional power in the present case. It was not denied that it may be suitable to invest the Court with this special power in certain types of cases (as, for instance, where the legal situation may in fact be practically unworkable), but, in the view of the British Government, the present case was not one of them. Guatemala had claimed on legal grounds territory which had been indisputably in the possession of Great Britain for at least a hundred years. Great Britain had been accused of holding territory which was not legally hers, and she was entitled to demand that this accusation should be dealt with on the basis on which it had been made. It was believed that the declaration which Great Britain had made in 1940 under the Optional Clause of the Statute invested the Court with jurisdiction to pronounce upon every one of the grounds upon which the Guatemalan claims were based. However, apparently in order to remove all doubts as to her willingness to submit the dispute to the Court under the terms of the British signature of the Optional Clause incorporating the reservation of so-called 'past disputes', Great Britain made a special declaration on 13 February 1946, offering to submit that particular dispute to a decision of the Court. It is of interest to reproduce the declaration in full:

> 'I, Ernest Bevin, His Majesty's Principal Secretary of State for Foreign Affairs, declare on behalf of His Majesty's Government in the United Kingdom in accordance with paragraph 2 of Article 36 of the Statute of the International Court of Justice that for a period of five years from the date of this declaration they accept as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning the interpretation, application or validity of any treaty relating to the boundaries of British Honduras, and over any questions arising out of any conclusions which the Court may reach with regard to such treaty.'

In rejecting the proposal that the case should be decided *ex aequo et bono*, the British Government stated their readiness to consider any suggestions which might be put forward for a final settlement of the dispute out of court. On 27 January 1947 the Guatemalan Government adhered to the Optional Clause for a period of five years. However, the telegram of Guatemala addressed to the President of the Court and containing the acceptance of the Clause terminated with the following sentence: 'The declaration does not cover the dispute between Great Britain and Guatemala concerning Belice which would only be submitted to the Court if the latter—as has been proposed—were empowered to decide the case *ex aequo et bono* as provided in Article 38, paragraph 2, of Statute.'

THE CORFU CHANNEL CASE: PRELIMINARY OBJECTION

THE International Court of Justice, on 25 March 1948, gave judgment in this matter. The proceedings were commenced by an Application filed by the Government of the United Kingdom on 13 May 1947 asking the Court to give a decision on the subject of Albanian responsibility for laying mines in the Corfu Channel. After some delay the Albanian Government wrote a letter to the Registrar of the Court on 2 July 1947 from which it appeared that it protested regarding the manner in which the proceedings were commenced, but was willing to appear before the Court. Times were accordingly fixed by the President of the Court during which the two parties were to submit their written arguments. The United Kingdom Government filed its case on 1 October 1947. On 9 December 1947, instead of dealing with the merits of the British case, the Albanian Government raised a Preliminary Objection to the jurisdiction of the Court. The Court, on 25 March 1948, consisting of fifteen permanent members and one additional member appointed *ad hoc* by the Albanian Government (Dr. Daxner), dismissed the objection by fifteen votes to one. The dissenting vote was recorded by Dr. Daxner. Two main points were argued before the Court:

(1) Whether the letter addressed by the Albanian Government to the Court on 2 July 1947 amounted to voluntary acceptance of the jurisdiction by the Albanian Government; and

(2) Whether, apart from (1), and as an entirely separate point, the resolution of the Security Council of 9 April 1947 recommending the two Governments to refer the dispute to the Court had the effect of creating compulsory jurisdiction for the purposes of the dispute.

The Court held that it had jurisdiction by reason of the Albanian letter, and did not consider it necessary to deal with the second point regarding the effect of Article 25 of the Charter. The issue raised by the second point, which the Court did not decide, was a general question of the greatest importance and seven of the judges, although concurring in the judgment of the Court, did express certain views about it. The actual point on which the Court reached its decision depended in a large measure on the construction of the Albanian letter; nevertheless, in the course of dealing with that point, the Court made certain observations of general application.

It must first be pointed out that under the Statute of the Court the general rule is that the Court only has jurisdiction over cases which both parties agree to submit to it, but, subject to this, it also has jurisdiction between parties which have accepted the Optional Clause, or when there is a provision in a particular treaty saying that disputes arising out of it are to go to the Court. The effect of the Court's judgment is that it is not necessary that the agreement of the parties to submit the case to the Court should be expressed in any particular form, such as a written agreement. The agreement to submit a case may be arrived at simply by one party filing an application to the Court and the other party merely replying to it on the merits, or else stating that it accepts the jurisdiction of the Court.

The text of the Albanian letter was as follows:

'The Government of the People's Republic of Albania finds itself obliged to observe:

'1. That the Government of the United Kingdom, in instituting proceedings before the Court, has not complied with the recommendation adopted by the Security Council on 9th April, 1947, whereby that body recommended "that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court".

'The Albanian Government considers that, according both to the Court's Statute and to general international law, in the absence of an acceptance by Albania of Article 36 of the Court's Statute or of any other instrument of international law whereby the Albanian Government might have accepted the compulsory jurisdiction of the Court, the Government of the United Kingdom was not entitled to refer this dispute to the Court by unilateral application.

'2. It would appear that the Government of the United Kingdom endeavours to justify this proceeding by invoking Article 25 of the Charter of the United Nations.

'There can, however, be no doubt that Article 25 of the Charter relates solely to decisions of the Security Council taken on the basis of the provisions of Chapter VII of the Charter and does not apply to recommendations made by the Council with reference to the pacific settlement of disputes since such recommendations are not binding and consequently cannot afford an indirect basis for the compulsory jurisdiction of the Court, a jurisdiction which can only ensue from explicit declarations made by States Parties to the Statute of the Court, in accordance with Article 36, 3, of the Statute.

'3. The Albanian Government considers that, according to the terms of the Security Council's recommendation of 9th April, 1947, the Government of the United Kingdom, before bringing the case before the International Court of Justice, should have reached an understanding with the Albanian Government regarding the conditions under which the two Parties, proceeding in conformity with the Council's recommendation, should submit their dispute to the Court.

'The Albanian Government is therefore justified in its conclusion that the Government of the United Kingdom has not proceeded in conformity with the Council's recommendation, with the Statute of the Court or with the recognised principles of international law.

'In these circumstances, the Albanian Government would be within its rights in holding that the Government of the United Kingdom was not entitled to bring the case before the Court by unilateral application, without first concluding a special agreement with the Albanian Government.

'4. The Albanian Government, for its part, fully accepts the recommendation of the Security Council.

'Profoundly convinced of the justice of its case, resolved to neglect no opportunity of giving evidence of its devotion to the principles of friendly collaboration between nations and of the pacific settlement of disputes, it is prepared, notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear before the Court.

'Nevertheless, the Albanian Government makes the most explicit reservations respecting the manner in which the Government of the United Kingdom has brought the case before the Court in application of the Council's recommendations and more especially respecting the interpretation which that Government has sought to place on Article 25 of the Charter with reference to the binding character of the Security Council's recommendations. The Albanian Government wishes to emphasize that its acceptance of the Court's jurisdiction for this case cannot constitute a precedent for the future.

'Accordingly, the Government of the People's Republic of Albania has the honour to inform you that it appoints as its Agent, in accordance with Article 35, paragraph 3, of the Rules of Court, M. Kahreman Ylli, Minister Plenipotentiary of Albania in Paris, whose address for service at the seat of the Court is the Legation of the Federal People's Republic of Yugoslavia at The Hague.'

The Court held:

(1) That there is nothing in the Statute of the Court which prevents a party, even in a case where the Court has not got jurisdiction by reason of the previous consent of the two litigants, from filing an application and seeing whether the other party will then take a step which shows that it accepts the jurisdiction, and
(2) That the Albanian letter of 2 July, quoted above, was such an acceptance.

Counsel for the Albanian Government attempted to argue that this letter did not amount to an acceptance of the jurisdiction, but merely indicated the willingness of the Albanian Government to appear before the Court, and that, furthermore, the reservations which they had made in it prevented it from being construed in any other way. The Court, however, considered that the language used by the Albanian Government could not be understood otherwise than as a waiver of any right to object to the Application of the United Kingdom Government on the ground that it was an incorrect or irregular mode of commencing proceedings.

Before saying more about the Court's decision on the main point it may be useful to deal briefly with the effect of Article 25 of the Charter, upon which the Court expressed no view. It was the contention of the United Kingdom (described by Professor Vochoc as *une contention fabuleuse*) that the provisions contained in this Article that 'Members of the United Nations agree to accept and carry out decisions of the Security Council in accordance with the present Charter' imposed an obligation on Members (and, therefore, on Albania, who was in the same position as a Member for the purpose of the case) to comply with the recommendations of the Security Council. The argument was based on the contention that the word 'decision' in Article 25 was perfectly general, and included any decision of the Security Council, in whatever form it might be expressed, including, that is to say, a recommendation. This point was fully argued by both sides before the Court, but the majority of the Court confined themselves to deciding the case on the basis of the Albanian letter of 2 July 1947. Seven of the judges, whilst concurring with the majority as to the effect of the Albanian letter, delivered a separate opinion. This opinion does not deal with the argument of the United Kingdom regarding Article 25 in detail but records the following views:

(1) The normal meaning of the word 'recommendation' excluded the possibility of maintaining the United Kingdom point of view.
(2) In principle the Charter and the Statute of the Court based the jurisdiction of the Court upon the consent of States.
(3) The object of Article 36 (3) of the Charter (under which the recommendation was made) was to 'remind the Security Council that legal disputes should normally be decided by judicial methods'. There was nothing in it which justified an interpretation the effect of which was to create a 'new case of compulsory jurisdiction'.

As to the main question decided by the Court, that is, the possibility of a voluntary acceptance of jurisdiction, the Court pointed out in its judgment that the Albanian Government itself had stated that it accepted the recommendation of the Security Council and recognized its obligation to refer the dispute to the Court 'in accordance with the provisions of the Statute'. These words formed part of the recommendation of the Security Council, and it was the contention of the Albanian Government that the dispute had not been referred in accordance with the provisions of the Statute. They based this contention on the ground that the proceedings were commenced by application instead of by special agreement, and they alleged that, as the Court had not a compulsory jurisdiction in the present case, a special agreement was necessary. The Court referred to the language used by the Albanian Government in its letter of 2 July stating that 'it is prepared, notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear before the Court'. The alleged irregularity consisted in bringing the case before the Court by application instead of by special agreement. The Court held that the Albanian letter could not be understood otherwise than as a waiver of any right to object to the application on the ground that it was an incorrect or irregular mode of commencing proceedings.

The reasoning of the Court on this aspect of the case may be summed up as follows:—

(*a*) The Albanian argument was based on the following propositions:

(i) the recommendation of the Security Council was that the dispute be referred to the Court in accordance with the provisions of the Statute;

(ii) under the Statute cases were referred to the Court either by application or by special agreement;

(iii) an application was appropriate where there was compulsory jurisdiction: voluntary jurisdiction required a special agreement;

(iv) as there was no compulsory jurisdiction in the present case there should have been a special agreement, without which the Court had no jurisdiction;

(*b*) The Court said that proposition (i) was correct; and that propositions (ii) and (iii) were too wide. There was nothing in the Statute which required the consent of the parties to be expressed in any particular form. There could be agreement without a *special* agreement.

(*c*) There had been agreement in this case manifested by the British application and the Albanian letter taken together. The Court said: 'There is nothing to prevent the acceptance of jurisdiction as in the present case being effected by two separate and successive acts instead of jointly and beforehand by special agreement.'

It is satisfactory to observe that the International Court referred in its judgment to the jurisprudence of its predecessor—the Permanent Court—thereby emphasizing continuity of doctrine built up over so many years. It is also satisfactory that, refusing to be impressed by technical arguments on points of form (which it did not in fact accept, seeing that it rejected the Albanian contention that proceedings may be begun by application only in cases of compulsory jurisdiction), it followed the example of the Permanent Court in its Judgment No. 12, and applied the principle there laid down to new facts.

J. M. J.

DECISIONS OF THE ENGLISH COURTS DURING 1946–7 INVOLVING POINTS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

1. In *Szalatnay-Stacho* v. *Fink* (1946), 62 T.L.R. 146; [1947] K.B. 1 the defendant, then Chief Military Prosecutor in the Czech Army, wrote a letter in this country to the Military Office, also temporarily in this country, of the President of the Czech Republic, transmitting a number of written statements from several Czech soldiers touching alleged acts by the plaintiff in Egypt while he was on diplomatic service there. The plaintiff complained that the letter was defamatory, and claimed damages. The defendant admitted the publication, but made privilege, either absolute or qualified, his sole defence. There was no evidence that the defendant was entitled to diplomatic immunity by reason of his position. Henn Collins J. held that the publication of the letter was not absolutely privileged 'either as being an act of State or as being a step in the proceedings of a military tribunal. . . . It was not in the proceedings of a military tribunal because this communication had nothing to do with any disciplinary matter, and did not touch or concern any matter over which any military tribunal had by Czech law any jurisdiction; and this privilege is conferred for the preservation of military discipline and administration. Still less, perhaps, do I think the dossier would be protected as an act of State. In my judgment, that protection is afforded only to communications passing at a higher level, so to speak, than this one.' He cited *Fraser on Libel*: 'For reasons of public policy . . . [absolute] . . . protection would, no doubt, be given to anything in the nature of an act of State, for example, to every communication relating to State matters made by one Minister to another or to the Crown. There is no authority which indicates that communications passing at a lower level than those between Ministers require this exceptional protection.'

But he found that in Czech law the communication to the Military Office of the President could not have founded any action, civil or criminal, and said:

> 'The question arises whether by the comity of nations His Majesty's courts should extend to communications such as this, passing between Czech nationals, on Czech affairs, the same protection as their own domestic Courts would afford. It is of course only by comity that protection could be afforded, even to the acts of State of a foreign Government, for we here have no direct interest in the good government of any foreign Power, however friendly. But equally of course we have an indirect interest . . . and in some circumstances it may be against the public interests of this country to entertain a writ involving an inquiry into reports made by an officer in the service of a foreign State to the Government of that State, and one of those circumstances would be the fact that such a communication would be protected in the foreign State. That, as I have found, is the case with this communication. If the comity of nations is ever to be applied, it should surely be applied where the document in question was published in this country only because the foreign Government, being our allies, were our guests. . . . I therefore think I ought to apply it and to hold that this dossier is absolutely privileged.'

The learned Judge also found that there had been no malice on the part of the defendant, and gave judgment for him.

The plaintiff appealed. Counsel for the defendant in the Court of Appeal did not rely on the point advanced by the trial Judge that since the communication could not have founded any action or prosecution under Czech law, it was by the comity of nations against the public interest of this country to entertain a suit; but he submitted simply that it was a step in judicial proceedings and absolutely privileged as such. Lord Justice Somervell delivered the judgment of the Court of Appeal to this effect: (*a*) There was little if any direct authority on the application of the principle of absolute privilege to foreign official documents. 'The principle in our law is based on public interest and, as it seems to us, would not necessarily apply to corresponding foreign documents.' (*b*) The communication of the letter was not the first step in judicial proceedings: 'At that time there were no Czechoslovak courts available either here or in Czechoslovakia before which the plaintiff, not being a soldier, could be charged.' (*c*) The document was made and published in England.[1] 'Having due regard to the exceptional position of the Czechoslovak Government, we do not think that the principle of the comity of nations compels or entitles the courts of this country to apply Czechoslovak law to acts done here, in proceedings in tort between Czechoslovak citizens, that law giving a general protection in civil suits to acts done by officials, which is not afforded under our law. This would be to make an inroad on a very fundamental principle. If there is to be such an application of foreign law in the circumstances set out it would, in our opinion, have to be expressly provided for by legislation. We therefore decide that this document was not absolutely privileged.' The Court of Appeal finally held that the communication had qualified privilege: 'No official would be justified in merely disregarding statements which suggested that a servant of the State had been guilty of disloyal action, if he honestly believed that they were or might be true. . . . It was an honest attempt to summarize the accusations. . . . Those to whom the document was sent had a common interest and duty with the defendant in the matters in question.' They also agreed with Henn Collins J. in finding that there was no evidence of malice. The appeal was therefore dismissed.

It is not easy to determine the *ratio decidendi* of this case. Henn Collins J. seems to have reasoned as follows: the foreign Government was temporarily situated in England with the consent of the Crown; an official of that Government had communicated information to higher authority about the conduct of another official; only a communication between ministers or between a minister and the head of state could be regarded as an act of State for the purposes of absolute privilege; nevertheless, the special position of the Czech Government in England demanded that, since under Czech law the communication was absolutely privileged from any action or prosecution in the courts, an English court must, by the comity of nations, also hold it absolutely privileged. The Court of Appeal, however, held that, the publication having been made wholly in England, English law was alone applicable, and that under the rules of English law as to publications by officials, the publication by the defendant of the documents complained of enjoyed qualified privilege. Thus the issue was the choice of law. Was English law or Czech law applicable? It is submitted that the undoubtedly correct decision by the Court of Appeal may be based on the following propositions:

(1) an English court may scrutinize the acts of a foreign Government, established in this country with the consent of the Crown, in order to determine whether they are in conformity with law;

(2) where such an act is in the form of legislation or decree it is in effect an act of sovereignty and its validity will be determined by the court according to the foreign law under which it purports to be done;[2]

(3) the acts of a foreign Governmental official, to whom immunity from civil process

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[1] *Hart* v. *Grumbach* (1873), L.R. 4 P.C. 439, was distinguished by the Court of Appeal on the ground that the alleged defamatory publication was made in China. It might be also added that this decision was no guide here because (*a*) English law, which had the same standing in that case as Czech law in the present case, was undoubtedly applicable by reason of the Treaty of Tientsin between China and Great Britain; (*b*) it was a decision of the Privy Council; and in any case (*c*) the relevant observations were *obiter dicta*.

[2] Propositions (1) and (2) are deduced from *In re Amand No. 2*, [1942] 1 K.B. 447 and 2 K.B. 27 (judgments of Caldecote L.C.J. and Croom Johnson J.). It is submitted that the judgments in this case are not authority for the statement by Mr. F. A. Mann, commenting on *Szalatnay-Stacho* v. *Fink* in *Modern Law Review*, vol. ix, No. 2, p. 181, that 'The consent of His Majesty to a foreign government exercising its sovereignty in England implies that in all matters of internal administration the foreign Government functions and lives under its own laws.'

has not been accorded in this country or whose immunity has been waived, are not to be regarded as sovereign acts of his Government, even though done in the course of his duty, and where such an act is done in this country, English law will be applied to the exclusion of the foreign law.

2. The decision of the Privy Council in *Co-operative Committee on Japanese-Canadians* v. *Attorney-General for Canada*, [1947] A.C. 87, contains an opinion on the right of a state to deport its nationals to a foreign country. The question in issue was whether certain Orders in Council dated 15 September 1945, empowering the Canadian Minister of Labour, were *ultra vires* the Governor-General in Council, either in whole or in part, and was raised on appeal by special leave from an opinion certified by the Supreme Court of Canada on a reference ordered by the Governor-General in Council.

The first Order empowered the Minister of Labour to make orders for deportation to Japan of persons in the following categories:

(1) every person over 16, other than a Canadian national, who was a Japanese national resident in Canada and had since 8 December 1941 requested repatriation or was still detained under certain regulations on 1 September 1945;
(2) every naturalized British subject of Japanese origin, who had requested repatriation and had not revoked such request on 1 September, 1945;
(3) natural-born British subjects of Japanese race over 16 and resident in Canada, who had requested repatriation and had not revoked it before the making of an order for deportation.

The second Order provided that any person in category (2) who was deported should, as from the date on which he left Canada, cease to be either a British subject or a Canadian national.

The third Order provided for the appointment of a Commission of Inquiry concerning the activities and loyalties during the war of persons in categories (1) and (2); the Commission had power to recommend the deportation of such persons and any person so recommended was to be deemed to be a person subject to deportation under the first Order, and as from the date on which he left Canada in the course of deportation, he should cease to be either a British subject or a Canadian national.

Counsel for the appellants argued that the comity of nations recognizes the right to deport aliens, but by clear implication it does not recognize the right to force a country to accept nationals of another country, and in the present case the receiving country, Japan, is not the place of origin. It was also argued, first, that the War Measures Act did not on its true construction authorize orders for deportation to be made in respect of British subjects or Canadian nationals, and that it should in certain respects receive a limited construction; secondly, that, if the Act purported to authorize the making of such orders, they would be contrary to the British Nationality and Status of Aliens Act, and therefore to that extent invalid. Lord Wright, delivering the opinion of the Board, met these arguments with the following:

> 'It was argued that the War Measures Act should be construed as authorizing only such orders as are consistent with the accepted principles of international law, and that the forcible removal to a foreign country of British subjects was contrary to the accepted rules of international law. . . . It may be true that in construing legislation some weight ought, in an appropriate case, to be given to a consideration of the accepted principles of international law, but the nature of the legislation in any particular case has to be considered in determining to what extent, if at all, it is right on a question of construction to advert to those principles. In their Lordships' view, those principles find no place in the construction of the War Measures Act. The Act is directed to the exercise by the Governor in Council of powers vested in the Parliament of the Dominion at a time when war, invasion, or insurrection or their apprehension exists. The accepted rules of international law applicable in time of peace can hardly have been in contemplation, and the inference cannot be drawn that the Parliament of

the Dominion impliedly imposed the limitation in question. Whether or not the word 'deportation' is in its application to be confined to aliens remains . . . open as a matter of construction of the particular statute in which it is found. In the present case the Act is directed to dealing with emergencies; . . . the word is found in the combination "arrest, detention, exclusion and deportation". As regards the first three of these words, nationality is obviously not a relevant consideration . . . in this Statute the word "deportation" is used in a general sense and as an action applicable to all persons irrespective of nationality. This being in their Lordships' judgment the true construction of the Act, it must apply to all persons who are at the time subject to the laws of Canada. Their Lordships see no reason for excluding from the scope of matters covered by the general power contained in s. 3 a power to take from persons, who have in fact under an order for Deportation left Canada, their status under the law of Canada as British subjects and Canadian nationals.'

The Board was also of the opinion, following *Attorney-General of Canada* v. *Cain*, [1906] A.C. 542, that the right of extraterritorial constraint was incident to the power of deportation[1] and must therefore have in contemplation the War Measures Act. It was held in conclusion that none of the orders were *ultra vires*, and the appeal was dismissed.

The Canadian Government had an undoubted right under international law to deport persons in category (1) and as a corollary the Japanese Government, even if it were a free agent, could not refuse to receive them. The persons defined in category (3) returning to Japan under a deportation order would in effect be going as volunteers, and upon that ground[2] as well as the principle stated by the Board, they could not challenge any extraterritorial constraint on the journey; this would also be true of the greater number of persons in category (2) though there might be persons deported who were prevented by the terms of the order from revoking their request for repatriation after 1 September 1945. But there would be no obligation upon the Japanese Government, were it a free agent, to accept persons in categories (2) and (3), and it was only because of the occupation of Japan that a scheme was possible for the deportation of British subjects to that particular country.[3]

3. The Court of Appeal dismissed the appeal by the defendants in *A/S Tallinna Laevauhisus* v. *Tallinn Shipping Co. Ltd.* (discussed in this *Year Book*, 23 (1946)). There are two points of interest in the judgments. The first is the question of the proof of foreign laws and decrees. Lord Justice Scott concentrated on the fact that the defendants had adduced no evidence of the decrees of the Estonian S.S.R. and U.S.S.R., since, although several of these decrees had been 'put in' by counsel for the defendants in his cross-examination of Dr. Rei, the expert witness on Estonian Law called by the plaintiffs, they were not sufficiently proved as legislative acts of the Estonian S.S.R. His judgment

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[1] See Lord Atkinson's judgment at p. 545: 'It was conceded in argument before their Lordships, on the principle of law laid down by this Board in the case of *MacLeod* v. *Attorney-General for N.S.W.* that the [enabling] statute must, if possible, be construed as merely intending to authorize the deportation of the alien across the seas to the country whence he came if he was imported into Canada by sea, or if he entered from an adjoining country, to authorize his expulsion from Canada across the Canadian frontier into that adjoining country. . . . No special significance was attached to the words "returned to the country whence he came" [in the enabling statute]. The reasoning . . . would apply with equal force if the word used had been "expel" or "deport" instead of "return".' See also the judgment of Jenkins J. in *Rex* v. *Secretary of State for Foreign Affairs and Secretary of State for the Colonies, Ex parte Greenberg*, 29 August, 1947. The Board also referred to the Extraterritorial Act, 1933, of Canada.

[2] Similar reasoning was applied by Jenkins J., in the case cited in note 1, *supra*, to illegal immigrants to Palestine, who refused to land at Port du Bouc in France, to which point they had been brought from Palestine waters under a deportation order of the Palestine Government.

[3] The fact that, by reason of the second Order in Council, they ceased to be British subjects upon leaving Canada is of course immaterial. The principle that there is no power given by the Aliens Restriction Order in England to deport an alien to a given country was accepted in argument by the Attorney-General in *C.* v. *E.* (1946), 62 T.L.R. 526.

contains a review of the authorities and a valuable summary of the rules of proof of foreign law in an English court:

> 'There being no expert evidence at all about the U.S.S.R. law, its legislation is not before the Court for application or even interpretation. . . . Even if it were open to us to hold (i) that all the decrees of the Soviet Estonian State which counsel for the defendants purported to "put in", as he called it, during the cross-examination of Dr. Rei, were thus duly proved as legislative acts of that State (which in my opinion it is not); and (ii) that we are free to construe the English translations "put in" as if they were English legal documents without regard to Dr. Rei's interpretation of them (which in my opinion we are not) there would be still a fatal gap in the proof of the Appellants' case. . . . I can find no evidence at all before the Court either that the A/S Tallinna Laevauhisus had been dissolved; or that any compulsory assignment of its right of action for the insurance moneys to any assignee had been effected by the new Estonian legislation. There is no relevant decree of the Estonian S.S.R. which, even on the hypothesis that Dr. Rei's evidence, constituted proof of the decree (which is I think precluded by Counsel for the plaintiffs' caveats) amounts to any such assignment. . . . The general rule of English private international law, that foreign law is in our courts a question of fact, is fundamental, although it does not inhibit the Court from using its own intelligence, as on any other question of evidence. The material proposition of foreign law must be proved by a duly qualified expert in the law of the foreign country, and the burden of proof rests on the party seeking to establish that law. . . . The degree of freedom, which the English Court has in putting its own construction on the written translation of foreign statutes before it, arises out of, and is measured by its right and duty to criticise the oral evidence of the witness. . . . The witness, however expert in the foreign law, cannot prevent the Court using its common sense; and the Court can reject his evidence if he says something patently absurd, or something inconsistent with the rest of his evidence—including the correct translation, for instance, of a foreign statute. . . . The illegality of the various legislative steps taken under Russian domination, as judged by the criterion of the law and constitution of old Estonia and demonstrated by Dr. Rei, would of course become immaterial if the Russian legislation had been proved below; but it is on that probative step that the Defendant's case in my opinion failed; for they called no evidence to prove it effectively.'

Lord Justice Tucker, though accepting these rules as set out by Lord Justice Scott, did think that some of the decrees which had been 'put in' were sufficiently in evidence. He said:

> 'Once it is admitted that any decree had in fact been issued and published in the State Gazette by a Government which must be regarded as the de facto Government of Estonia, I think it is impossible to contend that the decree was never in evidence. I think some of them were—(viz. Declaration concerning the nationalisation of banks and large industries passed by the Chamber of Deputies on 23 July, 1940; List of Shipping Enterprises subject to nationalisation approved by the Government of the Republic on 28 July, 1940; List of vessels so nationalised issued on 19 August, 1940). I think these were all sufficiently in evidence as executive acts of a de facto Government.'

But he drew a distinction between these decrees, which purported to divest the plaintiffs of their interest in the insurance moneys, and decrees promulgated by the Estonian S.S.R. and later by the U.S.S.R. after 6 August 1940, which purported to vest that interest in the defendants. He said:

> 'The decrees promulgated by the Estonian S.S.R. and later by the U.S.S.R. after 6 August, 1940, were not sufficiently in evidence, since Dr. Rei was merely being asked to express his views thereon on the assumption that proper proof thereof will in due course be given and the learned Judge was only accepting them de bene esse. . . . It follows, in my view, that assuming the Defendants established that under the July decrees the Plaintiffs were divested of this chose in action they failed to establish either

> from the evidence of a qualified witness or by proof of the necessary decrees . . . that the right to receive the money in court ever became vested in them.'

The second point of interest is the relation back of recognition of a foreign Government. Lord Justice Tucker held that the *de facto* recognition of the new Estonian Government by His Majesty's Government in the United Kingdom must be regarded as having retroactive effect at least to 21 July 1940.[1] He therefore dismissed the objection made by the plaintiffs relying[2] on Dr. Rei's interpretation of the decrees promulgated by the new Estonian Government, that these decrees were invalid as not in compliance with the old constitution. 'There was no evidence before the Court with regard to the exposition interpretation or adjudication of these decrees under the new régime after the overthrow of the former constitution as is required in such cases[3]. . . . I feel great doubt as to the propriety of an English court expressing a view[4] as to the effect of foreign legislation of this nature unassisted by expert evidence.' This case adds little to existing authority on the application of foreign laws purporting to assign property in this country, owing to the failure of the defendants to give adequate proof and elucidation of the Estonian S.S.R. and U.S.S.R. legislation and decrees upon which their case rested.

4. In *Parker* v. *Boggan*, [1947] 1 A.E.R. 46, Macnaghten J. held that where a lease provided and the tenant agreed that he would not assign, underlet, charge, or part with possession of the demised premises without the previous consent in writing of the landlord, and the tenant, having applied for such consent in writing without success, had let the demised premises to the Counsellor of the Turkish Embassy, the withholding of consent by the landlord was unreasonable.

> 'The only objection raised is . . . that Mr. Kavur is the counsellor to the Turkish Embassy . . . and as such is entitled by the comity of nations[5] to diplomatic privilege —for instance, he could not be sued in our courts—and by reason of that fact it was not unreasonable of the landlord to refuse consent to the grant of an underlease to him . . . most people would feel that it was reasonably certain that all the obligations into which he entered would be fully discharged and that if he did not discharge them the Turkish Empire [*sic*], for its own credit and reputation, would certainly see that they were discharged to the full. No sovereign foreign country could afford that any question should arise regarding the discharge of their obligations by their ministers and servants in this country. . . . I conclude, therefore, that it was not reasonable to object to the underlease to Mr. Kavur on the ground that is put forward. . . .'

[1] On this day the Estonian State Duma (the former Chamber of Deputies) declared Estonia a Soviet Socialist Republic.

[2] As had Atkinson J. in the Court below: 'I accept Dr. Rei's evidence that none of the decrees or laws relied upon were legal as judged by the old Estonian constitution. They were laws imposed doubtless by a de facto government but not by a government existing de jure.'

[3] *Lazard Bros. & Co.* v. *Midland Bank Ltd.*, [1933] A.C. 289, 298.

[4] He observed, however, *obiter*: 'As a matter of construction I would have thought that in the absence of express words, which are lacking, these decrees—although perhaps on their face purporting to transfer ships outside the jurisdiction—would not suffice to effect the assignment of a chose in action situate in a foreign country. I do not consider it necessary to decide whether or not they are confiscatory in character and if so, whether the Courts of this country would give effect thereto.'

[5] The expression 'comity of nations' is here in place. For a devastating criticism of the judicial habit of using it where 'international law' is meant see Lauterpacht in *Cambridge Law Journal*, 1947, p. 330. Professor Lauterpacht shows (i) that this use is 'vague, noncommittal and somewhat pretentious . . . is misleading and that there is no such antiquity about it as to make its abandonment impracticable'; and (ii) that there is 'a clear and practical distinction between comity and law' recognized and applied in fact over a century before the decision in *The Parlement Belge*, which he considers gave rise to the present confusion of terms. It will be noticed that in Case No. 2 above the Judicial Committee tacitly corrected counsel for the appellants in his use of 'comity of nations' for 'international law'.

The reasoning behind this judgment is that the representative of a foreign state in this country enjoys immunity from the jurisdiction of the courts, but is none the less subject to the rule of law, and that though the contracts into which he enters are not enforceable against him in the courts they are none the less binding on him and can be enforced by diplomatic sanctions. In other words, any suggestion that immunity from the jurisdiction of the courts constitutes a release from legal obligations is unsound.

5. The outstanding importance in the Constitutional Law of the British Commonwealth of *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1947] 1 A.E.R. 137, justifies its notice here. At the Fourth Session of the 18th Parliament of Canada, Bill 9, entitled 'An Act to amend the Supreme Court Act', was introduced and received its first reading in the Canadian House of Commons on 23 January 1939. On 14 April 1939 the debate on the second reading of the Bill was adjourned in order that the question whether the Parliament of Canada had legislative competence to enact the provisions of the said Bill in whole or in part might be referred to the Supreme Court of Canada. On 19 January 1940 the Supreme Court certified that the Parliament of Canada was competent to enact the Bill in its entirety, and from this judgment the Attorneys-General of Ontario, British Columbia, and New Brunswick appealed, the Attorneys-General of Canada, Manitoba, and Saskatchewan being respondents.

The contents of the Bill were as follows:

> '1. Section 54 of the Supreme Court Act, c. 35 of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor:
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> '54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the court shall, in all cases, be final and conclusive.
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> '(2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.
>
> '(3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and the Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada.
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> '2. Nothing in this Act shall affect any application for special leave to appeal or any appeal to His Majesty in Council made or pending at the date of the coming into force of this Act.
>
> '3. This Act shall come into force upon a date to be fixed by proclamation of the Governor in Council published in the Canada Gazette.'

The Judicial Committee reviewed its earlier decisions[1] on the question whether and how far the Parliament of Canada is competent to amend the Supreme Court Act so as to exclude appeals to His Majesty in Council. They were of the opinion that Section 101 of the British North America Act, 1867,[2] qualified by Section 2 of the Statute of Westminster, 1931, constituted adequate and wider grounds than those underlying the decision in *British Coal Corporation* v. *Rex*, and their reasoning may be summarized thus:

(*a*) The legislative power vested in the Parliament of Canada by Section 101 was limited by the prerogative rights of His Majesty in Council to hear appeals, since those rights were not expressly or by necessary intendment excluded; (*b*) the Statute of Westminster, 1931, s. 2,[1] removed this limitation on the legislative power, so that the Dominion Parliament became free to enact that the jurisdiction of its Supreme Court should be in all matters ultimate:

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[1] *Nadan* v. *Rex*, [1926] A.C. 482; *British Coal Corporation* v. *Rex*, [1935] A.C. 500.

[2] 'The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organisation, of a General Court of Appeal for Canada, and for the establishment of any additional court for the better administration of the laws of Canada.'

> 'It appears to their Lordships that it is not consistent with the political conception which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a Supreme Court of Appeal having a jurisdiction both ultimate and exclusive of any other member. The regulation of appeals is, to use the words of Lord Sankey in the Coal Corporation case "a prime element in Canadian sovereignty", which would be impaired if, at the will of its citizens, recourse could be had to a tribunal in the constitution of which it had no voice. It is irrelevant that the question is one that may have seemed unreal at the date of the British North America Act. To such an organic Statute the flexible interpretation must be given that changing circumstances require, and it would be alien to the spirit with which the preamble to the Statute of Westminster is instinct to concede anything less than the widest amplitude of power to the Dominion legislature under Section 101 of the British North America Act.'

Their Lordships then turned to Section 7 of the Statute of Westminster on which the appellants strongly relied, urging that to interpret the Statute as vesting in the Dominion Parliament a power which it did not before possess was in effect to repeal or amend or at least to alter the British North America Act. Their Lordships could not accept this reasoning. They said:

> 'Necessarily the effect of the Statute is to amend and alter the Act in so far as from the operation of the Statute there arises a new power in the legislatures both of the Dominion and the Provinces. The question is in which legislature the power is vested in regard to this particular subject matter. That is a question of construction on which Their Lordships have stated their opinion.[2] Sub-section (2) does not call for further comment here. In regard to sub-section (3) the same observations appear to apply as to sub-section (1). If, on the true construction of the British North America Act, the conclusion had been that the power to legislate for the abrogation of appeals to His Majesty in Council was vested under Section 92 in a provincial legislature, that would have been an end of the matter. It is just because Their Lordships have come to a different conclusion that sub-section (3) does not assist the appellants.'

Their Lordships were of the opinion that the appeal failed and that it ought to be declared that Bill 9 is wholly *intra vires* the Parliament of Canada.

6. *Apt* v. *Apt*, [1947] 1 A.E.R. 620, was the first decision by the English courts on the validity of a marriage celebrated by proxy. On 15 January 1941 a marriage was celebrated in Buenos Aires between H. and W., W. being resident and domiciled in this country, and represented at the ceremony by a person whom, by power of attorney executed in London on 8 November 1940, she had named as her representative to contract the marriage. The ceremony was valid and effectual by Argentine law, which recognizes proxy marriages, as evidenced by the marriage certificate. H., whose domicil of origin was German, was held to have acquired a domicil of choice in the Argentine. The power of

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[1] *Validity of laws made by the Parliament of a Dominion.*

'S. 2. (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.'

[2] That the power is vested in the Dominion Parliament by s. 101.

attorney described W. as of full age, single, capable, and known to the notary public, and it empowered Mrs. G. to contract the marriage on her behalf in Buenos Aires, and to sign the necessary documents. H. failed to make arrangements for W. to come to the Argentine, and ceased, after 1945, to answer letters. W. petitioned for a decree of nullity. Counsel for the petitioner, in an able and ingenious argument, maintained first that the distinction between the form and essence of a marriage is not absolute, and that the question whether the presence of both parties is essential in order that a ceremony may be regarded as a marriage must, where one of the parties is domiciled and resident in England at the time of the ceremony, be determined as a matter of policy by English law. Secondly, that a proxy marriage offends against English public policy for the following reasons: (i) the possibility of revocation of the power of attorney may be defeated by the delay or loss of the letter of revocation; (ii) it is a clandestine marriage as far as concerns this country; (iii) it would facilitate the inward traffic in prostitution; (iv) there is no *locus contractus* and therefore the public policy which compels the recognition of a marriage valid by the *lex loci contractus* does not apply; (v) the Marriage Acts, including the Foreign Marriage Act, 1892, all require the presence of both the parties at the ceremony, and this must be taken to be a declaration of public policy. Lord Merriman rejected the first main argument on the ground that, had the petitioner gone to the Argentine, and there signed a power of attorney enabling her to be represented at the ceremony by proxy, the case would have unquestionably come within the rule of *locus regit actum.* In the petitioner's case, therefore, the issue as to public policy is reduced to the question whether or not she should be allowed to sign the power of attorney here. He said:

> 'I am not satisfied that a single test of public policy can be applied to all proxy marriages indiscriminately. . . . The converse case of the husband in the Argentine being a domiciled Englishman and intending to make the matrimonial home here, and the case of a minor domiciled in this country where the law does not permit him to give a power of attorney at all seems manifestly to call for separate consideration, as does the case . . . of the revocation of the power of attorney before the ceremony.'

He concluded, therefore, that the power of attorney being valid and there being no question of revocation, the argument failed. As to (i), (ii), and (iii) of the heads of alleged public policy upon which the petitioner relied, Lord Merriman said:

> 'I recognise the possibility that the mischiefs depicted under these headings may arise from a judicial declaration in favour of this marriage, but if so, they are all matters which can be dealt with by the legislature.'

As to (iv): 'the marriage certificate is conclusive as to the place of celebration . . . and it is not seriously disputed that it was Buenos Aires.'

As to (v): 'The argument that such declarations of public policy operate universally . . . ignores the fact that public policy also demands, by virtue of the comity of nations, the recognition of marriages celebrated out of this country in accordance with forms and ceremonies in no wise conforming to those prescribed by the Marriage Acts.' Further, 'it is hardly possible to base this argument on the principle that the presence of both parties at the celebration is necessary for a Christian marriage. It is not disputed that proxy marriages were recognised by the Canon law.'[1]

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[1] For example, in the Argentine, Portugal, Spain, and also in certain States of the United States of America. His Lordship reviewed briefly two United States decisions: *Ex parte Suzanna* (1924), 295 Fed. Rep. 713, decided by the District Court of Massachusetts: W., resident in Portugal, marriage in Portugal, H. being resident in Pennsylvania and represented by proxy; nothing in the law of Pennsylvania required the personal presence of the parties at the ceremony. Held, a valid marriage.

U.S. ex rel. Modianos v. *Tuttle* (1925), 12 Fed. Rep. 927, decided by the District Court of Louisiana: H. domiciled and resident at time of marriage in Louisiana, represented by proxy at marriage ceremony in Turkey: revised civil code of Louisiana provides that no marriage can be contracted or celebrated by procuration. Held, (i) that this provision had only territorial effect; (ii) that there was nothing in proxy marriages conflicting with views of Christendom; (iii) that it

His Lordship concluded that the celebration of marriage by proxy is a matter of form and not essential, and he dismissed the petition. It has been the practice to regard proxy marriages as valid for such administrative purposes as the issue of passports upon grounds of acquisition of British nationality by the marriage, and it is most satisfactory that this practice has now been confirmed by the courts.[1]

7. In *Baindail* v. *Baindail*, [1946] P. 122, the Court of Appeal affirmed the decision of Barnard J. following his previous decision in *Srini Vasan* v. *Srini Vasan*, [1945] P. 67, and put it beyond question that the English courts will attribute the status of a married man to a man who has contracted a polygamous marriage valid by the law of his domicil, so as to prevent him contracting a second marriage in England during the existence of the first. In this case the respondent, being domiciled in India, married an Indian woman according to Hindu rites in the United Provinces, India, on 1 May 1928. This marriage was polygamous under Hindu law and custom. On 5 May 1939 the respondent went through a form of marriage with the petitioner at Holborn Register Office, his Indian wife being still alive. A child was born of this marriage on 22 February 1940. The petitioner and respondent were still living in England on 20 May 1944, when the petitioner, having learned of the Indian marriage, petitioned for a decree that the marriage celebrated between her and the respondent was null and void, and that she might have custody of the child. Lord Greene said:

> 'The practical question in this case appears to be, will the courts of this country, in deciding upon the validity of this English marriage, give effect to the status possessed by the respondent? That question we have to decide with due regard to common sense and some attention to reasonable policy. We are not fettered by any concluded decision on the matter. The learned Judge set out in a striking manner some of the consequences which would follow from disregarding the Hindu marriage for present purposes. I think it is pertinent to bear in mind that the prospect of an English Court saying that it will not regard the status of marriage conferred by a Hindu ceremony would be a curious one when very little more than a mile away the Privy Council[2] might be sitting and coming to a precisely opposite conclusion as to the validity of such a marriage on an Indian appeal. I do not think we can disregard that circumstance. We have to apply the law in a state of affairs in which this question of the validity of Hindu marriages is necessarily of very great practical importance in the every-day running of our Commonwealth and Empire . . . if the marriage with the petitioner was a valid marriage, it would have this consequence: that she is entitled to the consortium of her husband to the exclusion of any other woman. . . . If he decided to go back to India, it would be her duty as a wife to follow him to the home that he would provide. . . . The position therefore would be that this English lady would find herself compelled in India either to leave her husband or to share him with his Indian wife. . . . Whether or not she could divorce him in India because in India he was associating with a woman who, under Indian law, was his lawful wife, I do not know, and I do not stop to enquire. Is it right that the courts of this country should give effect to a ceremony of marriage the result of which would be to put the petitioner into such a position? . . . On principle it seems to me that the courts are for this purpose bound to recognise the Indian marriage as a valid marriage and an effective bar to any subsequent marriage in this country.'

The Master of the Rolls was careful to make it clear that his judgment related solely

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was for the state legislature to except proxy marriages from *lex loci* rule, if it was so desired. The marriage was valid.

[1] The decision has since been upheld by the Court of Appeal.

[2] It is submitted that the position might be curious, but not illogical. The Privy Council, sitting as a court of appeal from India, sits as an Indian court administering Indian law; it would not be faced with the specific problem before the English court of whether such a marriage is to be recognized in England and for the purpose of English law.

to the facts of the case connected with the validity of the English marriage as such. 'I must not be taken as suggesting that for every purpose and in every text an Indian marriage such as this would be regarded as a valid marriage in this country . . . nothing that I have said must be taken as having the slightest bearing on the law of bigamy. On the question of whether a person is "married" within the meaning of the Statute, which is a criminal statute, when he has entered into a Hindu marriage in India, I am not going to express any opinion whatever. It seems to me a different question in which other considerations may well come into play.' The appeal from the judgment of Barnard J. was therefore dismissed.

There would appear therefore to be two main grounds for the decisions: first, that a refusal to attribute married status to a man who has contracted a polygamous marriage so as to permit him to contract a second marriage in this country would put the second wife in an intolerable legal and personal position; secondly, it would obviously be contrary to public policy to refuse such attribution when the greater portion of British subjects in the British Commonwealth and Empire are in fact polygamous.

8. *De Reneville* v. *de Reneville*, [1947] 2 A.E.R. 112, now before the Court of Appeal may prove to be an important decision in suits for nullity of marriage, both on the question of jurisdiction and for the opportunity it offers to the Court of Appeal to overrule *Easterbrook* v. *Easterbrook*, [1944] P. 10, and *Hutter* v. *Hutter*, [1944] P. 95.[1] H. was a Frenchman, domiciled in France. W. was born in England of English parents and was domiciled in England until her marriage. The marriage was celebrated in Paris in 1937, and they resided in various places to which H. was called by his military duties. H. had been resident in French territory since the marriage, except for a few months in England in 1938. In April 1940 W. went to Biskra in Algeria because H. was seriously ill there, and stayed there for six weeks. She then returned to England and has lived there ever since, apart from H. In a suit by W. for the nullity of the marriage on the ground of incapacity of H., or his wilful refusal to consummate the marriage, a preliminary issue was taken on an application by H. to determine whether the Court had jurisdiction to entertain the suit. Jones J. held that W. acquired H.'s domicil by her marriage to him. He then applied the distinction between a void and voidable marriage to the one before him, and held that it was a marriage 'which is perfectly good until there is a decree saying it is to be voided on the ground of the incapacity which is alleged in the petition' and 'at the present moment it is a subsisting marriage'. He showed that W. could not, on the fact, assert a domicil of her own.[2]

He then proceeded to discuss the central question whether, in view of *Roberts* v. *Brennan*, [1902] P. 143, and *White* v. *White*, [1937] P. 111, the residence of W. as the petitioner in this country was sufficient to confer jurisdiction upon the Court. With regard to *Roberts* v. *Brennan*, the learned Judge recalled the doubts of Horridge J.[3] whether the report of that case could be correct, and said: 'It does not appear to me to be clear from that report that the petitioner only was resident within the jurisdiction. Sir Francis Jeune P. referred to matrimonial residence and stated that residence, not domicil, was the test of jurisdiction, but it does not appear clear, though it may be the fact, that he was deciding that the residence of one party, i.e. the petitioner only, was enough to give the Court jurisdiction.' Jones J. then distinguished *White* v. *White* as a case in which Bucknill J. (as he then was) purported to follow *Roberts* v. *Brennan* on the ground of the special circumstances in the case before him. In *White* v. *White*:

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[1] If it should be proved that wilful refusal to consummate a marriage is not a ground of annulment in French law.

[2] As in *Stathatos* v. *Stathatos*, [1913] P. 46, and *de Montaigu* v. *de Montaigu*, [1913] P. 154.

[3] *Graham* v. *Graham*, [1923] P. 37: 'On production of the original citation, which I sent for, it appeared that the wife gave an address within the jurisdiction. The report in this case is not to my mind satisfactory as to the evidence of residence before the Court.'

(*a*) the respondent had not entered an appearance;[1]

(*b*) the respondent was already married at the time of the second marriage, in respect of which the petition for nullity was brought on the ground that it was bigamous and void.

These special circumstances,[2] in the opinion of Bucknill J., justified the Court in exercising jurisdiction in the case. Turning then to the case before him, Jones J. said that it was not a case of hardship, like *White* v. *White* or *Hutter* v. *Hutter*, and 'It does not appear to me that the authorities which have been cited establish that the Court has accepted jurisdiction, when the respondent was both resident and domiciled out of the jurisdiction and where there is no case of hardship or any special circumstances.' He gave judgment for the husband on the preliminary issue. This decision calls a halt to the reckless extension of jurisdiction which started with *Roberts* v. *Brennan*.

But there is a further recent decision extending jurisdiction, *Robert* v. *Robert*, [1947] 2 A.E.R. 22. W. married H. on 7 February 1940 at the Register Office in St. Peter Port, Guernsey, and the ceremony was in accordance with the law of Guernsey. The parties never lived together. W. joined the A.T.S. and had a bona fide residence in England—from December 1942 to February 1946, when she returned to her home in Guernsey. On 9 October 1945 she presented a petition for nullity on the ground of wilful refusal of the respondent to consummate the marriage, he being served with the petition in Guernsey on 1 May 1946. The parties were at all material times domiciled in Guernsey. Barnard J., after recalling that the jurisdiction of the ecclesiastical courts was based on the residence of the parties and that in suits for nullity the divorce court follows the practice of the ecclesiastical courts, referred to the extension of jurisdiction by *White* v. *White* following *Roberts* v. *Brennan*, and said: 'I have come to the conclusion that the wife, being resident here at the time of the institution of her suit, this court has jurisdiction to entertain it.' He then proceeded to the choice of law applicable, which, in his opinion, lay between the *lex fori*, the *lex loci celebrationis*, and the *lex domicilii*, both the latter being the law of Guernsey. 'There is evidence before me . . . that wilful refusal of the respondent to consummate the marriage is a ground for a decree of nullity of marriage, according to the law of Guernsey . . . wilful refusal to consummate the marriage, in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in the marriage and an error in the quality of the respondent.' He therefore held that the *lex loci celebrationis* applied. 'If I were wrong, and wilful refusal to consummate a marriage were to be considered as something affecting the capacity of one of the parties to contract marriage, then I am bound by the decision of the Court of Appeal in *Sottomayor* v. *de Barros*, (1877) 3 P.D. 1, to apply the *lex domicilii*.' In either case, then, the wife would be entitled to a decree of nullity. Decree nisi granted.

Dr. Martin Wolff has pointed out[3] that the jurisdiction of the ecclesiastical courts must be regarded as one of local competence and that the rules for determining that competence are hardly apt for international jurisdiction; and in any case there is no ground for applying the ecclesiastical rule, that jurisdiction is based on the residence of the parties, to a case where only the petitioner is resident within the jurisdiction. In the present case there was no evidence of hardship, or pre-ceremony domicil of the wife petitioner or indeed any special circumstance to bring the case within the scope of *White* v. *White*, and it is submitted with respect that there was no justification whatsoever for thus extending the jurisdiction of the court.

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[1] Counsel for the wife petitioner queried with some reason whether that was relevant.

[2] Cheshire, *Private International Law*, 3rd ed., p. 454, considers that the most favourable construction of the case is that jurisdiction was assumed because the *pre-ceremony* domicil of the wife was English, as in the recent case of *Mehta* v. *Mehta*, [1945] 2 A.E.R. 691.

[3] *Private International Law*, p. 83. *Williams* v. *Dormer* (1852), 2 Rob. Ecc. 505, and *Chichester* v. *Donegal* (1822), 1 Add. 5, cited by Westlake, *International Law*, vol. i (2nd ed., 1910), § 49, on residence as a ground of jurisdiction do not clearly distinguish between residence and domicil. In the former case, the wife would have been deemed to be resident in the jurisdiction in which her husband was *resident*, had she not been divorced from him *a mensa et thoro*. In the latter case, a distinction was made between actual and legal domicil, followed by the curious proposition that 'prima facie, the husband's actual, and the wife's legal, domicile are one'. If the modern rule, that the court is competent to decree nullity if the parties are resident within its jurisdiction, is to be traced back to such reasoning, then it has a very dubious ancestry. But is it necessary nowadays to cite the practice of the ecclesiastical courts on the point? Residence as a basis of jurisdiction can be justified on wider grounds: see Cheshire, *Private International Law*, p. 447.

9. The distinction between the jurisdiction of a court having only local competence and the national and 'international' jurisdiction of the High Court is well illustrated in *Forsyth* v. *Forsyth*, [1947] 1 A.E.R. 407. In this case, at the time of the marriage in 1943, H. was in the Army and W. went to live with his family in Scotland. H., while on leave, suggested that, owing to the shortage of room in the house, the wife should return to London and that he would join her on demobilization. W. went to her parents in London and H. did not join her; and W. heard or saw nothing further of him. On 18 July 1946 W. took out a summons before the Justices of the Petty Sessional Division of Edmonton on the ground that H. had deserted her. The summons was directed to H. at his B.A.O.R. address in Germany, under the Summary Jurisdiction (Process) Act, 1881. At the hearing H.'s solicitor objected to the jurisdiction on the ground that H. was a domiciled Scotsman. The Justices held that they had jurisdiction and that H. had deserted W., and made an order for maintenance of 20*s*. a week. H. appealed against the order. Lord Merriman said: 'So far as the extent of jurisdiction is concerned the question is whether there is any distinction between the Summary Jurisdiction (Married Women) Acts and the Bastardy Act, 1872 . . . manifestly the decision in *Berkley* v. *Thompson*[1] precludes Justices from assuming a jurisdiction in bastardy over a person ordinarily resident abroad, which includes Scotland, and not found within the jurisdiction, merely by reason of the procedural provisions of the Summary Jurisdiction Code, unless that jurisdiction is given by the substantive act creating the subject matter of the complaint.' It was necessary then to consider the relation between the Summary Jurisdiction (Married Women) Act, 1895, and the Summary Jurisdiction Act, 1848, Section 1, and this led the Court to the following conclusions: (*a*) Where an information is laid, or complaint is made, under the Summary Jurisdiction Act, 1848, Section 1, the *local jurisdiction* of any given justices is strictly limited by the commission of an offence within that local jurisdiction. (*b*) The causes of complaint under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, and later Acts must have arisen within the local jurisdiction of the justices, but 'it would be wholly alien to the obvious intent of this part of the section to impart the relevant proviso that the husband should be resident in this country'.[2] (*c*) Where the cause of complaint is wilful neglect to provide reasonable maintenance or desertion, it is deemed, at least partially, to arise where the wife, justifiably living apart from the husband, resides. 'The residence of the offender may be where it is impossible to reach him, but if it happens to be in Scotland, there is

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[1] (1884), 10 A.C. 45, *per* Lord Selborne: 'Though a summary jurisdiction under the Bastardy Acts is given to Justices . . . we shall have to consider the bastardy law in the first place and then, if necessary, the application to that law of the Summary Jurisdiction Acts afterwards. Now the bastardy laws did not before the year 1881 give to the Justices any jurisdiction in a case of this kind, where the person summoned was a Scotsman domiciled and not ordinarily but actually resident in Scotland.' Held, that it was therefore impossible to found jurisdiction, otherwise non-existent, on the provisions of the Summary Jurisdiction (Process) Act, 1881, ss. 4 and 6, since these sections regulate procedure where jurisdiction exists.

For purposes of comparison with the present case the Summary Jurisdiction (Married Women) Acts stand in the same relation to the Summary Jurisdiction Acts as did the Bastardy Laws Amendment Act, 1872; that is to say, the Summary Jurisdiction (Married Women) Acts are the substantive legislation, and the Summary Jurisdiction Acts proper, including the Summary Jurisdiction (Process) Act, 1881, merely regulate the procedure.

[2] That is to say, within the general or national jurisdiction.

special legislation which brings him within the jurisdiction, and does so not merely when he can be found and arrested within the jurisdiction', since by the Summary Jurisdiction (Process) Act, 1881, s. 4, the process which includes, by virtue of Section 8, the summons for desertion, may be served on him in the manner admittedly followed in this case. The Court therefore held that the summons had been properly served, and that the Justices had jurisdiction to try the case and make the order. Appeal dismissed.

10. *In re the Duke of Wellington, Glentanar* v. *Wellington*, [1947] Ch. 506. Wynn-Parry J. had to settle the distribution of the immovable property in Spain of the testator, the sixth Duke of Wellington, a British subject domiciled in the United Kingdom. Having chosen Spanish law as the *lex situs*, he interpreted this as including the Spanish rules of private international law, and then addressed himself to finding 'what is the law on the matter in question, which would be expounded by the Supreme Court of Spain if it were before that Court'. He found that Article 10 of the Spanish Civil Code provided that a succession was to be determined by the 'national law' of the testator, and he concluded[1] from the expert but conflicting evidence on Spanish law put before him by both sides, that the expression 'national law' meant in the present case English internal rules of succession; and that the Spanish courts would not accept a renvoi back to Spanish law.

It is submitted, with respect, that to purport to sit as a Spanish court was unnecessary, artificial, and not a little presumptuous. It was unnecessary because once the learned Judge had decided that the *lex situs* included Spanish rules of private international law, he could find those rules set out in Article 10 of the Spanish Civil Code, and in the present case the expression 'national law', as interpreted by an English court, satisfied that the translation was correct, could only mean English law, since the testator was a British subject domiciled in the United Kingdom; it was artificial because it introduced an otiose inquiry into the question whether Spanish law would accept the renvoi in this case, that is to say, whether a Spanish court would interpret 'national law' as including English rules of private international law. Had he continued to sit in an English court instead of in an imaginary Spanish court this question need not have arisen. The evidence of the expert witnesses could have been limited to the proof of Article 10 of the Civil Code; the learned Judge could have accepted the renvoi to English law and have done with it. Finally, it seems not a little presumptuous to sit as the Supreme Court of Spain in a case of which a relatively inferior court in England was seized, to determine a question on which the highest tribunal in England has not pronounced, and whose opinions on the question are unpredictable.

11. There are two cases from Palestine which, though they are not decisions of the English courts, are decisions in terms of English law, and therefore deserve notice in this work. The first is *Bialik* v. *Levison* (July 1947, unreported). This was an application in the District Court of Jerusalem in July 1947 for a declaration that the applicant was validly divorced from the respondent. Both parties were members of the Jewish community and domiciled in Palestine. They were married in Palestine according to Jewish religious rites in July 1940, the applicant being then a Palestinian citizen and the husband, though Palestinian born, a British subject. The applicant learned after the marriage that he was a British subject. A son was born in June 1942, but relations became strained and ended in a divorce which took place in Jerusalem according to Jewish religious rites in January 1947, and being, in effect, a divorce by mutual consent. The respondent did not oppose the application but it was opposed by the Attorney-General as being a matter of public

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[1] Basing himself on the following interpretations of Spanish law:
(i) The estate of a deceased person is one and universal, wherever the assets are situated and whatever be their nature, a principle derived from statutist doctrines.
(ii) The absence of any decisive authorities as to whether the doctrine of renvoi has been received into Spanish law.
(iii) The existence of a strong cleavage of opinion among Spanish jurists on the question in (ii).

importance. Rigby J. held that the applicant had acquired British nationality by her marriage.[1] He did not accept the Attorney-General's argument that the District Court had no jurisdiction to grant such a declaratory judgment in view of the Palestine Orders in Council, 1922–41, Article 64.[2] He based his refusal on the ground that the judgment of the Judicial Committee in *Sasson* v. *Sasson*, [1924] A.C. 1007, was authority for the general principle that declaratory judgments of the nature sought in this case might properly be given where the facts and the particular law applicable thereto justifies such a course, even though there would have been no jurisdiction to dissolve or annul the marriage.

The learned Judge then proceeded to consider 'whether as a matter of law a divorce by mutual consent of members of the Jewish faith domiciled in this country, but who are British subjects, would be recognised as valid according to English law[3]. . . . The Hammersmith Marriage Case seems to me to be distinguishable on the simple ground that there the marriage took place in England according to the law of England . . . in the words of Darling, J. "there was nothing to show that when Dr. Mir-Anwarruddin married Ruby Hudd, either he or she intended that the ceremony should confer upon her anything other than the status which the English law gives to an English wife, whether married in a Registrar Office or in a Cathedral Church".' The learned Judge continued: 'If a marriage valid according to the law of the country where it is effected is good all the world over, I am quite unable to see any reason, whether in law or fact, why the divorce performed in the same country and valid according to the same law of that country—albeit though, in the entire absence of civil or canon law, it is the religious law—should not equally be good all the world over. That proposition seems to me all the more unassailable when the parties concerned are domiciled in the country where that marriage and divorce takes place, even though they may be nationals of a foreign country.' He held therefore that the divorce could and would properly be recognized as valid according to English law, and granted the declaration.

There seems to be no doubt of the soundness of this judgment, and that its *ratio decidendi* is that the divorce must be recognized as valid under English law, because it was a divorce which was valid by the law of the matrimonial domicil of the parties, and did not offend in form or effect against any rule of English public policy. The learned Judge masked this *ratio* somewhat by the suggestion that it was also a ground for recognizing the divorce as valid that it was performed in and valid according to the law of the same country as the marriage. This would be to determine the validity of the divorce according to the *lex loci*, and is plainly inadmissible.

12. The other case is *Falkingham* v. *Falkingham and the Attorney-General*, Civil Case No. 439/46. This was an application for a declaration by the District Court of Tel Aviv

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[1] Palestine Citizenship Orders, 1925–41, Art. 12 (3); British Nationality and Status of Aliens Acts, 1914–33, Section 10 (1).

[2] Art. 64 of the Palestine Order in Council, 1922, was amended by the Palestine Order in Council, 1939, Article 12, thus: 'Article 64 of the Principal Order shall be revoked and the following Article shall be substituted therefor: 64 (i) Subject to the provisions of Article 54 of this Order, matters of personal status affecting foreigners [viz. persons other than Palestinian citizens] other than Moslems in respect of whom Moslem religious courts have exclusive jurisdiction under Article 52 of this Order, shall be decided by the District Courts. . . . Provided that the District Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage except in accordance with an Ordinance conferring such jurisdiction; (ii) the personal law of the foreigner concerned shall be the law of his nationality unless that law imports the law of his domicile, in which case the latter shall be applied.'

Since no Ordinance has been promulgated conferring jurisdiction to dissolve or annul marriages, it appears that Christian British subjects, even though domiciled in Palestine, cannot obtain there decrees of divorce or nullity.

[3] He discussed the *Hammersmith Marriage Case*, [1917] 1 K.B. 634, and in particular the judgments of Bray J. and Darling J.; *Spivak* v. *Spivak* (1930), 142 L.T. 490; and *Nachimson* v. *Nachimson*, [1930] P. 85.

that the marriage of the applicant and the first respondent, celebrated in 1942 in the office of the District Commissioner of Lydda district, was null and void. The applicant was, at the time of the marriage and the application, a member of the Jewish community and an Austrian national,[1] and the first respondent was a British subject and a Christian. According to Austrian law 'marriage contracts between Christians and persons who do not confess to the Christian religion cannot be legally concluded'.[2] Wyndham J. held that he had jurisdiction in accordance with Articles 47 and 64 (1) of the Palestine Order in Council, 1922.[3] He then considered the question whether he had power to declare the marriage a nullity in face of the provisions of Article 64 (1) prohibiting the Court from pronouncing a decree of dissolution of marriage.

He had no difficulty in showing that a declaration of the Court that a marriage is void *ab initio* cannot be regarded as a dissolution of the marriage. 'It is the intention that one must seek not the actual words used in the application . . . for this reason I attach no importance to the fact that in the present application the relief sought is that the marriage be declared null and void. Obviously in such a case what is meant is that the alleged marriage be declared null and void, and in reality the relief sought is that the ceremony be declared to have been no marriage. To hold otherwise would . . . be merely to play with words.' He referred to two decisions of equal authority in the Palestine courts, one declaring that a district court has no power to issue a declaration that a marriage between foreigners was void *ab initio*; the other declaring that it had such power. Being therefore free, the learned Judge elected to follow the second for two reasons: first, that it was later in date, and, secondly, that it was in line with the decision in *Hutter* v. *Hutter*, [1944] 2 A.E.R. 368. Having therefore decided that the Court had jurisdiction and the power to make the declaration, it only remained to decide whether the marriage was null and void under the applicable law. Applying the Austrian law referred to above, he held and declared accordingly that the marriage of the parties was and always had been null and void.

If it was correct that the Austrian Civil Code remained in force, as regards the law of marriage applicable to those who were Austrian nationals before 3 July 1938,[4] a doubt remains whether the interpretation of its provisions accepted by the Palestine Court in this case was sound. It seems strange on the face of it that, even if the Austrian marriage law was applicable to Austrian nationals purporting to contract marriage abroad, it could render a non-Christian Austrian incapable of contracting marriage with a Christian; here the capacity of the non-Christian wife was in question, and it would have been more satisfactory if the expert witness had been pressed to say whether Article 64 of the Austrian Civil Code was not in fact derived from the Pauline privilege and did not operate therefore to render only Christian Austrians incapable of marrying non-Christians.[5]

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[1] It is difficult to see how the applicant could be described as an Austrian national in 1942; His Majesty's Government in the United Kingdom had recognized the extinction of Austria and the Palestine Court should have informed itself of the true position.

[2] Articles 64 and 94 of the Austrian Civil Code, 1811. An expert witness on Austrian law testified that this law was applicable to marriages of Austrian nationals whether contracted in Austria or abroad, and was in force in 1939, that is to say, after the *Anschluss* and the German decree of 3 July 1938 extinguishing Austrian nationality.

[3] See note 2 on p. 427.

[4] The District Court of Zürich held on 10 January 1939 that the Hague Convention of 1902 concerning the Conclusion of Marriages, to which Germany and Switzerland but not Austria were parties, applied also to Austrian nationals who had become German citizens as a result of the annexation: see *Annual Digest*, 1941–2, Case No. 23.

[5] Since this article was written it has come to notice that in the latter part of 1938 a marriage law was promulgated in Austria which made specific provision for marriages contracted abroad. This law, which does not substantially affect the Austrian Civil Code, seems not to have been put in evidence or cited to the Court in *Falkingham* v. *Falkingham*.

DOCUMENTARY SECTION
(SECOND YEAR)

CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

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INTRODUCTORY NOTE

CONSIDERATIONS of space render it impossible to chronicle in this volume of the *Year Book* all the recent developments in the life of the numerous specialized agencies which are now coming into being or are beginning or continuing their activities under the aegis of the United Nations. This section of the *Year Book* is, therefore, confined for the current year to the reproduction of the texts of four major instruments, together with introductory notes to them, and more general comment upon international constitutional and administrative development is held over until next year.

The four Constitutions printed here are those of the International Labour Organization, which is an institution already a quarter of a century old, but whose constituent instrument has recently been revised; the International Bank for Reconstruction and Development, upon which some comment was made in the previous volume of the *Year Book*;[1] the World Health Organization, which is to replace the League Health Organization, the old *Office international d'Hygiéne publique*, and, at a later date, the Pan-American Sanitary Organization;[2] and the International Refugee Organization, which is to take over the work which the League of Nations did in relation to refugees, as well as those functions more recently performed by U.N.R.R.A. and the Intergovernmental Committee for Refugees. Of the four Constitutions, only that of the International Bank is at the time of writing in force. But the International Labour Organization is of course already in existence and some of the amendments contained in its proposed new Constitution are already in force.[3] Both the World Health Organization[4] and the International Refugee Organization[5] are already represented by interim bodies whose task in each case is to do all things necessary to bring the permanent organization into existence and in the meantime to exercise its functions in whole or in part.

For the scheme of arrangement of this section of the *Year Book*, and for some general remarks upon what may be termed the United Nations phase of international administrative development, the reader is referred to the Introductory Note contained in the last volume.[6]

A. *PERMANENT ORGANIZATIONS*

I. *The International Labour Organization* (*I.L.O.*)

The Constitution of the International Labour Organization was originally contained in Part XIII, or the Labour Part, of the Treaty of Versailles and in the corresponding parts of the other Peace Treaties (save the Treaty of Lausanne) which marked the termination of the War of 1914–18. In 1922 the Fourth Session of the International Labour Conference adopted a draft amendment to Article 393 (of the Treaty of Versailles), the purpose of which was to increase the size of the Governing Body of the International Labour

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[1] Vol. 23 (1946), pp. 432–3.

[2] See *infra*, p. 446.

[3] See *infra*, p. 430.

[4] See *infra*, p. 446.

[5] See *infra*, p. 480.

[6] Vol. 23 (1946), pp. 394–412.

Office from twenty-four to thirty-two persons, and which was ultimately ratified in accordance with Article 422 and entered into force on 30 June 1934. Apart from this change, the written Constitution of the International Labour Organization remained unaltered until after the close of the War of 1939–45. In part, this stability was a consequence of the remarkable vision of those who drafted the original instrument. In part, it resulted from the skill and devotion which have characterized the staff of the institution and which have permitted the growth within it of a structure of constitutional convention the significance of which in international constitutional law as a whole may prove to be great. As an example, albeit of secondary importance, of this process of constitutional elaboration within the I.L.O. there may be cited the silent change whereby 'Part XIII of the Treaty of Versailles and the Corresponding Parts of the other Treaties of Peace'[1] has become the 'Constitution of the International Labour Organisation', with its Articles numbered from 1 to 41.[2]

At the 26th Session of the Conference, held at Philadelphia in 1944, there was adopted a Declaration concerning the Aims and Purposes of the International Labour Organization, commonly called the Declaration of Philadelphia. The possible effect upon the Organization of this document, which President Roosevelt thought might well prove as important for mankind as the American Declaration of Independence, is difficult to estimate because of the very width and generosity of the aims set out in the original Preamble to the Constitution. In a sense it serves to indicate to the Organization a number of pressing matters to which it should pay attention, much in the same manner as the Nine Guiding Points contained in Article 427 of the Treaty of Versailles. And it is presumably for that reason that the Declaration is now to be annexed to the Constitution in place of the Nine Guiding Points.[3] The Declaration, however, is more than a mere agenda, and its adoption may in future be seen to have marked the transmutation of the I.L.O. from a body merely protective of labour into one of wholly positive aims.

One significant passage in the Declaration of Philadelphia contains a pledge of full co-operation with other international bodies entrusted with a share of that responsibility for the securing of a fuller and broader utilization of the world's productive resources which the I.L.O. now has. What constitutional changes the giving of that pledge would by itself have necessitated is not wholly clear. It was, in the event, reinforced by a Resolution unanimously adopted at the 27th Session of the Conference in Paris in 1945, whereby full co-operation with the then newly created United Nations was specifically offered and undertaken. The same session of the Conference decided upon the adoption without delay of a limited number of amendments to the Constitution designed to deal with problems of immediate urgency. There was, accordingly, drawn up a formal amending instrument, to be cited as the 'Constitution of the International Labour Organization Instrument of Amendment, 1945'.[4] The problems dealt with by this Instrument, which entered into force on 26 September 1946, arose out of the dissolution of the League of Nations, of which the I.L.O. was, in virtue of Article 1 of the Constitution, in some sense the twin.

Three principal changes in the Constitution were effected by the Instrument of 1945:

1. The former identity—or partial identity—of membership of the League and membership of the I.L.O. was abrogated and a somewhat looser connexion with membership of the United Nations substituted. Whereas by Article 378 of the Treaty of Versailles (Art. I of the original Constitution) membership of the I.L.O. was expressed to be attainable, in the case of a state not qualified by reason of its specification in Annex I of the Covenant to be an original member of the League only, through acquisition of membership of the League, Article I of the Constitution as amended provides that membership

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[1] Cf. Oppenheim, *International Law*, vol. i (5th ed.), p. 575, n. 2.

[2] Cf. *First Report of the Conference Delegation on Constitutional Questions* (Montreal, I.L.O., 1946), p. 20.

[3] See *infra*, p. 432.

[4] Text in *Treaty Series*, No. 20 (1946), Cmd. 6880.

of the United Nations shall carry with it *the right to* membership of the I.L.O. It is further provided that the General Conference may also admit states not members of the United Nations by a two-thirds majority vote comprehending the vote of two-thirds of the Government delegates present and voting. Upon this amendment it is to be observed that, apart from the obvious replacement of the League by the United Nations, it involves no change at all. For the practice of the I.L.O. from the very beginning was to admit states not members of the League,[1] and the active participation of those states whose membership was an automatic consequence of their belonging to the League obviously could not be compelled.[2]

2. The finances of the I.L.O. were extricated from their former connexion with the finances of the League, and their linking to those of the United Nations was envisaged. By Article 399 of the Treaty of Versailles (Article 13 of the original Constitution) the expenses of the International Labour Office and of the meetings of the Conference and Governing Body were made a charge on the general funds of the League. Article 13 of the revised Constitution empowers the I.L.O. to make such financial and budgeting arrangements with the United Nations as may appear appropriate and provides that, pending or in default of such arrangements, independent financing shall be determined by a two-thirds majority of the Conference and approved by a Committee of Government Representatives. This stipulation must be read in the light of Article 17 (3) of the Charter of the United Nations whereby it is provided that the General Assembly shall consider and approve the budgeting arrangements of the specialized agencies with a view to making recommendations thereon to such agencies. The Agreement between the I.L.O. and the United Nations respecting their general relations with one another does not embody the definitive budgeting and financial arrangements contemplated in Article 13, and the I.L.O. is not even bound thereunder, as are the lesser specialized agencies by the corresponding agreements with them, to consult the United Nations in the preparation of its budget.[3] But this must not be taken to imply that autonomous finance is necessarily desired by the I.L.O.[4] On the contrary, the latter recognizes the desirability of close financial relationships with the United Nations and agrees pending their establishment to transmit its proposed budget annually to the United Nations as it does to its own members, whilst the United Nations may undertake the collection of the contributions of such members of the I.L.O. as are also members of the United Nations. The revised Article 13 has also to be read in the light of the resolution for its dissolution adopted by the Final Session of the Assembly of the League.[5] It was therein provided in general that the winding-up of the League was not to prejudice the continued existence of the I.L.O. and in particular that the Working Capital Fund and an appropriate share of other League funds should be transferred to the I.L.O., and that the buildings occupied by the latter at Geneva should be effectively vested in it. By an international agreement between the Secretary-General of the League and the Acting-Director of the International Labour Office, dated 4–17 May 1946, supplemented by a notarial agreement effective under the law of Switzerland dated 1 July 1946, the I.L.O. building at Geneva has been transferred to that Organization. An agreement with Switzerland regarding the legal status of the I.L.O. in that country, and an arrangement for the execution of the same, have also been negotiated. And the 'Common Plan' of the League Supervisory Commission and the United Nations has provided for the use by the I.L.O. of the old League Assembly Hall and other appropriate accommodation and of the League Library. Further, the Resolution of the League Assembly referred to has provided for the taking over by the I.L.O. of the League Administrative Tribunal, and also, if that body is willing, of the administration of the Staff Pensions Fund and the Pensions Fund for

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[1] Cf. Hudson in *American Journal of International Law*, 28 (1934), pp. 669, 671–3, and the literature listed in Oppenheim, op. cit., vol. i, p. 576, n. 4.

[2] Cf. Jenks in this *Year Book*, 16 (1935), p. 79; 23 (1946), pp. 301, 304.

[3] See this *Year Book*, 23 (1946), p. 405.

[4] Cf. Jenks, loc. cit., 23 (1946), pp. 301, 305.

[5] See McKinnon Wood in this *Year Book*, 23 (1946), pp. 317–23.

former Judges of the Permanent Court. The custody of such of the contents of the League treaty registry as relate to it, including the authentic texts of International Labour Conventions, instruments of ratification thereof, and the register of ratifications, has likewise passed to the I.L.O.[1]

3. The process of amendment of the Constitution has been simplified. Under Article 422 of the Treaty of Versailles (Art. 36 of the original Constitution) an amendment to the Constitution needed to be adopted by a two-thirds majority vote of the Conference and to be ratified by the States represented in the Council of the League as well as by three-quarters of the Members of the I.L.O. itself before it came into force. Under the new Article 36, adoption by the Conference by a majority of two-thirds of the votes cast and ratification or acceptance by two-thirds of the Members of the Organization, including five of the eight Members represented in the Governing Body as being of chief industrial importance,[2] is to suffice.

Other changes effected by the Instrument of Amendment of 1945 are purely consequential upon the dissolution of the League except for three: provision is made for the formal confirmation of the silent change of the name of the constituent instrument to the 'Constitution';[3] provision is made to enable states to withdraw from the I.L.O.;[4] and Members in arrear with their contributions for more than two years are deprived of their voting power unless the Conference permits its continuance upon being satisfied that failure to pay is due to conditions beyond the control of the Member concerned.[5]

Though the occasion for the adoption of the amendments outlined above was the impending dissolution of the League, it would be a mistake to regard them as of a mere consequential nature. For they clearly involve improvements from the point of view of general international constitutional law and practice and, in particular, mark a further progress of the majority principle in the sphere of international organization.

The concern of the 27th Session of the Conference with the Constitution of the I.L.O., however, went farther than the adoption of these amendments and of the Resolution offering full co-operation with the United Nations to which reference has been made. The same Session of the Conference also set up a somewhat awkwardly named 'Conference Delegation on Constitutional Questions', with a 'comprehensive mandate to review all outstanding questions relating to the Constitution and constitutional practice' of the Organization. The Delegation, which was composed on the tripartite basis which the constitution and practice of the I.L.O. have made familiar, held its First Session in London in January–February 1946, under the chairmanship of the Chairman of the Governing Body. It there began the task of carrying on the work of the Constitutional Committee previously set up by request of the Philadelphia Conference. That Committee, preoccupied as it was with laying down the principles which guided the Governing Body's representatives when they were invited to be present at the San Francisco Conference whereat the Charter of the United Nations was drafted, had not reached any definite conclusions on constitutional change when the Paris Session of the Conference began. The Delegation, however, achieved in London a comprehensive First Report,[6] containing thirty-nine paragraphs of 'conclusions and recommendations'. These dealt not only with the Constitution but also with the standard form of international labour conventions, with the location of sessions of the Conference, with certain matters—notably labour inspection—which it is desirable to place on the agenda of the Conference in the near future, and with many other wider issues affecting the work of the I.L.O. and the implementation and extension of international labour conventions and recommendations. So far as concerned the Constitution, the Delegation recommended many particular amendments. Some of these were no more than consequential upon the dissolution of the League. Amongst the more important of the remainder were: the annexing of the Declaration of Philadelphia to the text in place of the Nine Guiding Points contained in

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[1] See, generally, Jenks and McKinnon Wood, loc. cit.

[2] Cf. Art. 7 (3) of the Constitution.

[3] See *supra*, p. 430.

[4] Art. 1 (5).

[5] Art. 13 (4).

[6] I.L.O., Montreal, 1946.

Article 427 of the Treaty of Versailles (Art. 41 of the original Constitution); a series designed to define the privileges and immunities of the I.L.O. in the same manner that the privileges and immunities of the various new organizations resulting from the United Nations movement are defined in the Constitutions of these bodies;[1] a series designed to facilitate co-operation between the I.L.O. and the United Nations; a series clarifying the constitutional position of the Governing Body within the Organization; and, most important of all, a series designed to reinforce to some extent the provisions of the original Constitution relating to the implementing of Draft Conventions—the name of which, incidentally, was recommended to be changed to 'conventions'—by imposing upon Members comprehensive duties of reporting on action taken. That the elimination of the provisions of Article 414 of the Treaty of Versailles (Art. 28 of the original Constitution), and of the Articles following, respecting economic sanctions in case of non-observance of international labour conventions, was also recommended is again worthy of mention.

The Delegation at its First Session further proposed a convention for the partial revision of international labour conventions already adopted in conformity with the transfer of chancery functions in connexion with such conventions from the League to the I.L.O., a form of final articles suitable for use in future conventions to facilitate their ratification, and a model clause concerning measures to secure observance of future conventions. The First Report was circulated to the Governments of Member States and met with a general measure of approval. A Second Session of the Delegation met, however, in Montreal and New York in May 1946 to consider problems which arise in connexion with the application by Federal States of conventions and recommendations. And a Second Report[2] was presented, recommending an additional amendment of Article 405 of the Treaty of Versailles (Art. 19 of the original Constitution) clarifying and reinforcing the obligations of such states.

On the basis of the Reports of the Delegation, the 29th Session of the Conference, held at Montreal in October 1946, adopted a further Instrument of Amendment of the Constitution. This Instrument embodied, it would appear, all the recommendations of the Delegation, and the Conference in fact added nothing to them except to make verbal changes here and there and to elaborate somewhat the proposals regarding the extension of conventions to 'non-metropolitan territories' (Art. 35). One verbal change is of some interest: that of the title of the chief executive of the I.L.O. from Director to Director-General in order to secure uniformity of practice with other specialized agencies.

The English text of the Constitution will be printed in this section of the *Year Book* as soon as it comes into force. An exhaustive and, indeed, authoritative commentary upon the changes it will embody has, it may be mentioned, already appeared in these pages.[3] In view of this fact little further comment would appear necessary.

But it remains to mention that the Montreal Conference adopted, in addition to the Instrument of Amendment of 1946, a Convention for the partial revision of existing international conventions for the purpose of making provision for future discharge by the I.L.O. of those chancery functions in relation to such conventions formerly exercised by the League. This follows the terms of the draft prepared by the Delegation.[4]

THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION

PREAMBLE

Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures;

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[1] See this *Year Book*, 23 (1946), pp. 406 ff.

[2] I.L.O., Montreal, 1946.

[3] Vol. 23 (1946), pp. 301–17.

[4] See *supra*. As to the work of the Negotiating Delegation of the I.L.O. see *supra*, p. 431.

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;

The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organisation:

Chapter I. Organisation

Article 1

1. A permanent organisation is hereby established for the promotion of the objects set forth in the Preamble to this Constitution and in the Declaration concerning the aims and purposes of the International Labour Organisation adopted at Philadelphia on 10 May 1944 the text of which is annexed to this Constitution.

2. The Members of the International Labour Organisation shall be the States which were Members of the Organisation on 1 November 1945, and such other States as may become Members in pursuance of the provisions of paragraphs 3 and 4 of this Article.

3. Any original Member of the United Nations and any State admitted to membership of the United Nations by a decision of the General Assembly in accordance with the provisions of the Charter may become a Member of the International Labour Organisation by communicating to the Director-General of the International Labour Office its formal acceptance of the obligations of the Constitution of the International Labour Organisation.

4. The General Conference of the International Labour Organisation may also admit Members to the Organisation by a vote concurred in by two thirds of the delegates attending the session, including two thirds of the Government delegates present and voting. Such admission shall take effect on the communication to the Director-General of the International Labour Office by the Government of the new Member of its formal acceptance of the obligations of the Constitution of the Organisation.

5. No Member of the International Labour Organisation may withdraw from the Organisation without giving notice of its intention so to do to the Director-General of the International Labour Office. Such notice shall take effect two years after the date of its reception by the Director-General, subject to the Member having at that time fulfilled all financial obligations arising out of its membership. When a Member has ratified any International Labour Convention, such withdrawal shall not affect the continued validity for the period provided for in the Convention of all obligations arising thereunder or relating thereto.

6. In the event of any State having ceased to be a Member of the Organisation, its re-admission to membership shall be governed by the provisions of paragraph 3 or paragraph 4 of this Article as the case may be.

Article 2

The permanent organisation shall consist of:

(*a*) a General Conference of representatives of the Members;

(*b*) a Governing Body composed as described in Article 7; and
(*c*) an International Labour Office controlled by the Governing Body.

Article 3

1. The meetings of the General Conference of representatives of the Members shall be held from time to time as occasion may require, and at least once in every year. It shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members.

2. Each delegate may be accompanied by advisers, who shall not exceed two in number for each item on the agenda of the meeting. When questions specially affecting women are to be considered by the Conference, one at least of the advisers should be a woman.

3. Each Member which is responsible for the international relations of non-metropolitan territories may appoint as additional advisers to each of its delegates:

(*a*) persons nominated by it as representatives of any such territory in regard to matters within the self-governing powers of that territory; and
(*b*) persons nominated by it to advise its delegates in regard to matters concerning non-self-governing territories.

4. In the case of a territory under the joint authority of two or more Members, persons may be nominated to advise the delegates of such Members.

5. The Members undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organisations, if such organisations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries.

6. Advisers shall not speak except on a request made by the delegate whom they accompany and by the special authorisation of the President of the Conference, and may not vote.

7. A delegate may by notice in writing addressed to the President appoint one of his advisers to act as his deputy, and the adviser, while so acting, shall be allowed to speak and vote.

8. The names of the delegates and their advisers will be communicated to the International Labour Office by the Government of each of the Members.

9. The credentials of delegates and their advisers shall be subject to scrutiny by the Conference, which may, by two thirds of the votes cast by the delegates present, refuse to admit any delegate or adviser whom it deems not to have been nominated in accordance with this Article.

Article 4

1. Every delegate shall be entitled to vote individually on all matters which are taken into consideration by the Conference.

2. If one of the Members fails to nominate one of the non-Government delegates whom it is entitled to nominate, the other non-Government delegate shall be allowed to sit and speak at the Conference, but not to vote.

3. If in accordance with Article 3 the Conference refuses admission to a delegate of one of the Members, the provisions of the present Article shall apply as if that delegate had not been nominated.

Article 5

The meetings of the Conference shall, subject to any decisions which may have been taken by the Conference itself at a previous meeting, be held at such place as may be decided by the Governing Body.

Article 6

Any change in the seat of the International Labour Office shall be decided by the Conference by a two-thirds majority of the votes cast by the delegates present.

Article 7

1. The Governing Body shall consist of thirty-two persons:
Sixteen representing Governments,
Eight representing the employers, and
Eight representing the workers.

2. Of the sixteen persons representing Governments, eight shall be appointed by the Members of chief industrial importance, and eight shall be appointed by the Members selected for that purpose by the Government delegates to the Conference, excluding the delegates of the eight Members mentioned above. Of the sixteen Members represented, six shall be non-European States.

3. The Governing Body shall as occasion requires determine which are the Members of the Organisation of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are considered by an impartial committee before being decided by the Governing Body. Any appeal made by a Member from the declaration of the Governing Body as to which are the Members of chief industrial importance shall be decided by the Conference, but an appeal to the Conference shall not suspend the application of the declaration until such time as the Conference decides the appeal.

4. The persons representing the employers and the persons representing the workers shall be elected respectively by the employers' delegates and the workers' delegates to the Conference. Two employers' representatives and two workers' representatives shall belong to non-European States.

5. The period of office of the Governing Body shall be three years. If for any reason the Governing Body elections do not take place on the expiry of this period, the Governing Body shall remain in office until such elections are held.

6. The method of filling vacancies and of appointing substitutes and other similar questions may be decided by the Governing Body subject to the approval of the Conference.

7. The Governing Body shall, from time to time, elect from its number a Chairman and two Vice-Chairmen, of whom one shall be a person representing a Government, one a person representing the employers, and one a person representing the workers.

8. The Governing Body shall regulate its own procedure and shall fix its own times of meeting. A special meeting shall be held if a written request to that effect is made by at least twelve of the representatives on the Governing Body.

Article 8

1. There shall be a Director-General of the International Labour Office, who shall be appointed by the Governing Body, and, subject to the instructions of the Governing Body, shall be responsible for the efficient conduct of the International Labour Office and for such other duties as may be assigned to him.

2. The Director-General or his deputy shall attend all meetings of the Governing Body.

Article 9

1. The staff of the International Labour Office shall be appointed by the Director-General under regulations approved by the Governing Body.

2. So far as is possible with due regard to the efficiency of the work of the Office, the Director-General shall select persons of different nationalities.

3. A certain number of these persons shall be women.

4. The responsibilities of the Director-General and the staff shall be exclusively international in character. In the performance of their duties, the Director-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organisation. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organisation.

5. Each Member of the Organisation undertakes to respect the exclusively international

character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 10

1. The functions of the International Labour Office shall include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour, and particularly the examination of subjects which it is proposed to bring before the Conference with a view to the conclusion of international Conventions, and the conduct of such special investigations as may be ordered by the Conference or by the Governing Body.

2. Subject to such directions as the Governing Body may give, the Office will—

(*a*) prepare the documents on the various items of the agenda for the meetings of the Conference;

(*b*) accord to Governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection;

(*c*) carry out the duties required of it by the provisions of this Constitution in connection with the effective observance of Conventions;

(*d*) edit and issue, in such languages as the Governing Body may think desirable, publications dealing with problems of industry and employment of international interest.

3. Generally, it shall have such other powers and duties as may be assigned to it by the Conference or by the Governing Body.

Article 11

The Government departments of any of the Members which deal with questions of industry and employment may communicate directly with the Director-General through the representative of their Government on the Governing Body of the International Labour Office or, failing any such representative, through such other qualified official as the Government may nominate for the purpose.

Article 12

1. The International Labour Organisation shall co-operate within the terms of this Constitution with any general international organisation entrusted with the co-ordination of the activities of public international organisations having specialised responsibilities and with public international organisations having specialised responsibilities in related fields.

2. The International Labour Organisation may make appropriate arrangements for the representatives of public international organisations to participate without vote in its deliberations.

3. The International Labour Organisation may make suitable arrangements for such consultation as it may think desirable with recognised non-governmental international organisations, including international organisations of employers, workers, agriculturists and co-operators.

Article 13

1. The International Labour Organisation may make such financial and budgetary arrangements with the United Nations as may appear appropriate.

2. Pending the conclusion of such arrangements or if at any time no such arrangements are in force—

(*a*) each of the Members will pay the travelling and subsistence expenses of its delegates and their advisers and of its representatives attending the meetings of the Conference or the Governing Body, as the case may be;

(*b*) all other expenses of the International Labour Office and of the meetings of the

Conference or Governing Body shall be paid by the Director-General of the International Labour Office out of the general funds of the International Labour Organisation;

(*c*) the arrangements for the approval, allocation and collection of the budget of the International Labour Organisation shall be determined by the Conference by a two-thirds majority of the votes cast by the delegates present, and shall provide for the approval of the budget and of the arrangements for the allocation of expenses among the Members of the Organisation by a committee of Government representatives.

3. The expenses of the International Labour Organisation shall be borne by the Members in accordance with the arrangements in force in virtue of paragraph 1 or paragraph 2(*c*) of this Article.

4. A Member of the Organisation which is in arrears in the payment of its financial contribution to the Organisation shall have no vote in the Conference, in the Governing Body, in any committee, or in the elections of members of the Governing Body, if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years: Provided that the Conference may by a two-thirds majority of the votes cast by the delegates present permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

5. The Director-General of the International Labour Office shall be responsible to the Governing Body for the proper expenditure of the funds of the International Labour Organisation.

CHAPTER II. PROCEDURE

Article 14

1. The agenda for all meetings of the Conference will be settled by the Governing Body, which shall consider any suggestion as to the agenda that may be made by the Government of any of the Members or by any representative organisation recognised for the purpose of Article 3, or by any public international organisation.

2. The Governing Body shall make rules to ensure thorough technical preparation and adequate consultation of the Members primarily concerned, by means of a preparatory Conference or otherwise, prior to the adoption of a Convention or Recommendation by the Conference.

Article 15

1. The Director-General shall act as the Secretary-General of the Conference, and shall transmit the agenda so as to reach the Members four months before the meeting of the Conference, and, through them, the non-Government delegates when appointed.

2. The reports on each item of the agenda shall be despatched so as to reach the Members in time to permit adequate consideration before the meeting of the Conference. The Governing Body shall make rules for the application of this provision.

Article 16

1. Any of the Governments of the Members may formally object to the inclusion of any item or items in the agenda. The grounds for such objection shall be set forth in a statement addressed to the Director-General who shall circulate it to all the Members of the Organisation.

2. Items to which such objection has been made shall not, however, be excluded from the agenda, if at the Conference a majority of two thirds of the votes cast by the delegates present is in favour of considering them.

3. If the Conference decides (otherwise than under the preceding paragraph) by two thirds of the votes cast by the delegates present that any subject shall be considered by the Conference, that subject shall be included in the agenda for the following meeting.

Article 17

1. The Conference shall elect a President and three Vice-Presidents. One of the Vice-Presidents shall be a Government delegate, one an employers' delegate and one a workers' delegate. The Conference shall regulate its own procedure and may appoint committees to consider and report on any matter.

2. Except as otherwise expressly provided in this Constitution or by the terms of any Convention or other instrument conferring powers on the Conference or of the financial and budgetary arrangements adopted in virtue of Article 13, all matters shall be decided by a simple majority of the votes cast by the delegates present.

3. The voting is void unless the total number of votes cast is equal to half the number of the delegates attending the Conference.

Article 18

The Conference may add to any committees which it appoints technical experts without power to vote.

Article 19

1. When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form: (*a*) of an international Convention, or (*b*) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.

2. In either case a majority of two thirds of the votes cast by the delegates present shall be necessary on the final vote for the adoption of the Convention or Recommendation, as the case may be, by the Conference.

3. In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

4. Two copies of the Convention or Recommendation shall be authenticated by the signatures of the President of the Conference and of the Director-General. Of these copies one shall be deposited in the archives of the International Labour Office and the other with the Secretary-General of the United Nations. The Director-General will communicate a certified copy of the Convention or Recommendation to each of the Members.

5. In the case of a Convention—

(*a*) the Convention will be communicated to all Members for ratification;

(*b*) each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action;

(*c*) Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this Article to bring the Convention before the said competent authority or authorities, with particulars of the authority or authorities regarded as competent, and of the action taken by them;

(*d*) if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention;

(*e*) if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.

6. In the case of a Recommendation—

(*a*) the Recommendation will be communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise;

(*b*) each of the Members undertakes that it will, within a period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months after the closing of the Conference, bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action;

(*c*) the Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this Article to bring the Recommendation before the said competent authority or authorities with particulars of the authority or authorities regarded as competent, and of the action taken by them;

(*d*) apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.

7. In the case of a federal State, the following provisions shall apply:

(*a*) in respect of Conventions and Recommendations which the federal Government regards as appropriate under its constitutional system for federal action, the obligations of the federal State shall be the same as those of Members which are not federal States;

(*b*) in respect of Conventions and Recommendations which the federal Government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent States, provinces, or cantons rather than for federal action, the federal Government shall—

   (i) make, in accordance with its Constitution and the Constitutions of the States, provinces or cantons concerned, effective arrangements for the reference of such Conventions and Recommendations not later than eighteen months from the closing of the session of the Conference to the appropriate federal, State, provincial or cantonal authorities for the enactment of legislation or other action;

   (ii) arrange, subject to the concurrence of the State, provincial or cantonal Governments concerned, for periodical consultations between the federal and the State, provincial or cantonal authorities with a view to promoting within the federal State co-ordinated action to give effect to the provisions of such Conventions and Recommendations;

   (iii) inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring such Conventions and Recommendations before the appropriate federal, State, provincial or cantonal authorities with particulars of the authorities regarded as appropriate and of the action taken by them;

(iv) in respect of each such Convention which it has not ratified, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent States, provinces or cantons in regard to the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement, or otherwise;

(v) in respect of each such Recommendation, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent States, provinces or cantons in regard to the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as have been found or may be found necessary in adopting or applying them.

8. In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.

Article 20

Any Convention so ratified shall be communicated by the Director-General of the International Labour Office to the Secretary-General of the United Nations for registration in accordance with the provisions of Article 102 of the Charter of the United Nations but shall only be binding upon the Members which ratify it.

Article 21

1. If any Convention coming before the Conference for final consideration fails to secure the support of two thirds of the votes cast by the delegates present, it shall nevertheless be within the right of any of the Members of the Organisation to agree to such Convention among themselves.

2. Any Convention so agreed to shall be communicated by the Governments concerned to the Director-General of the International Labour Office and to the Secretary-General of the United Nations for registration in accordance with the provisions of Article 102 of the Charter of the United Nations.

Article 22

Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

Article 23

1. The Director-General shall lay before the next meeting of the Conference a summary of the information and reports communicated to him by Members in pursuance of Articles 19 and 22.

2. Each Member shall communicate to the representative organisations recognised for the purpose of Article 3 copies of the information and reports communicated to the Director-General in pursuance of Articles 19 and 22.

Article 24

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the Government against which it is made, and may invite that Government to make such statement on the subject as it may think fit.

Article 25

If no statement is received within a reasonable time from the Government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

Article 26

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing Articles.

2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Enquiry, as hereinafter provided for, communicate with the Government in question in the manner described in Article 24.

3. If the Governing Body does not think it necessary to communicate the complaint to the Government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Enquiry to consider the complaint and to report thereon.

4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.

5. When any matter arising out of Articles 25 or 26 is being considered by the Governing Body, the Government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the Government in question.

Article 27

The Members agree that, in the event of the reference of a complaint to a Commission of Enquiry under Article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject matter of the complaint.

Article 28

When the Commission of Enquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

Article 29

1. The Director-General of the International Labour Office shall communicate the report of the Commission of Enquiry to the Governing Body and to each of the Governments concerned in the complaint, and shall cause it to be published.

2. Each of these Governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice.

Article 30

In the event of any Member failing to take the action required by paragraphs 5(*b*), 6(*b*) or 7(*b*)(i) of Article 19 with regard to a Convention or Recommendation, any other

Member shall be entitled to refer the matter to the Governing Body. In the event of the Governing Body finding that there has been such a failure, it shall report the matter to the Conference.

Article 31

The decision of the International Court of Justice in regard to a complaint or matter which has been referred to it in pursuance of Article 29 shall be final.

Article 32

The International Court of Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Enquiry, if any.

Article 33

In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Enquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

Article 34

The defaulting Government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission of Enquiry or with those in the decision of the International Court of Justice, as the case may be, and may request it to constitute a Commission of Enquiry to verify its contention. In this case the provisions of Articles 27, 28, 29, 31 and 32 shall apply, and if the report of the Commission of Enquiry or the decision of the International Court of Justice is in favour of the defaulting Government, the Governing Body shall forthwith recommend the discontinuance of any action taken in pursuance of Article 33.

CHAPTER III. GENERAL

Article 35

1. The Members undertake that Conventions which they have ratified in accordance with the provisions of this Constitution shall be applied to the non-metropolitan territories for whose international relations they are responsible, including any trust territories for which they are the administering authority, except where the subject matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions.

2. Each Member which ratifies a Convention shall as soon as possible after ratification communicate to the Director-General of the International Labour Office a declaration stating in respect of the territories other than those referred to in paragraphs 4 and 5 below the extent to which it undertakes that the provisions of the Convention shall be applied and giving such particulars as may be prescribed by the Convention.

3. Each Member which has communicated a declaration in virtue of the preceding paragraph may from time to time, in accordance with the terms of the Convention, communicate a further declaration modifying the terms of any former declaration and stating the present position in respect of such territories.

4. Where the subject matter of the Convention is within the self-governing powers of any non-metropolitan territory the Member responsible for the international relations of that territory shall bring the Convention to the notice of the Government of the territory as soon as possible with a view to the enactment of legislation or other action by such Government. Thereafter the Member, in agreement with the Government of the territory, may communicate to the Director-General of the International Labour Office a declaration accepting the obligations of the Convention on behalf of such territory.

5. A declaration accepting the obligations of any Convention may be communicated to the Director-General of the International Labour Office—

(*a*) by two or more Members of the Organisation in respect of any territory which is under their joint authority; or

(*b*) by any international authority responsible for the administration of any territory, in virtue of the Charter of the United Nations or otherwise, in respect of any such territory.

6. Acceptance of the obligations of a Convention in virtue of paragraph 4 or paragraph 5 shall involve the acceptance on behalf of the territory concerned of the obligations stipulated by the terms of the Convention and the obligations under the Constitution of the Organisation which apply to ratified Conventions. A declaration of acceptance may specify such modifications of the provisions of the Convention as may be necessary to adapt the Convention to local conditions.

7. Each Member or international authority which has communicated a declaration in virtue of paragraph 4 or paragraph 5 of this Article may from time to time, in accordance with the terms of the Convention, communicate a further declaration modifying the terms of any former declaration or terminating the acceptance of the obligations of the Convention on behalf of the territory concerned.

8. If the obligations of a Convention are not accepted on behalf of a territory to which paragraph 4 or paragraph 5 of this Article relates, the Member or Members or international authority concerned shall report to the Director-General of the International Labour Office the position of the law and practice of that territory in regard to the matters dealt with in the Convention and the report shall show the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and shall state the difficulties which prevent or delay the acceptance of such Convention.

Article 36

Amendments to this Constitution which are adopted by the Conference by a majority of two thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two thirds of the Members of the Organisation including five of the eight Members which are represented on the Governing Body as Members of chief industrial importance in accordance with the provisions of paragraph 3 of Article 7 of this Constitution.

Article 37

1. Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

2. Notwithstanding the provisions of paragraph 1 of this Article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organisation and any observations which they may make thereon shall be brought before the Conference.

Article 38

1. The International Labour Organisation may convene such regional conferences and establish such regional agencies as may be desirable to promote the aims and purposes of the Organisation.

2. The powers, functions and procedure of regional conferences shall be governed by rules drawn up by the Governing Body and submitted to the General Conference for confirmation.

CHAPTER IV. MISCELLANEOUS PROVISIONS

Article 39

The International Labour Organisation shall possess full juridical personality and in particular the capacity—

(*a*) to contract;
(*b*) to acquire and dispose of immovable and movable property;
(*c*) to institute legal proceedings.

Article 40

1. The International Labour Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Delegates to the Conference, members of the Governing Body and the Director-General and officials of the Office shall likewise enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.

3. Such privileges and immunities shall be defined in a separate agreement to be prepared by the Organisation with a view to its acceptance by the Members.

ANNEX

DECLARATION CONCERNING THE AIMS AND PURPOSES OF THE INTERNATIONAL LABOUR ORGANISATION

The General Conference of the International Labour Organisation, meeting in its Twenty-sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labour Organisation and of the principles which should inspire the policy of its Members.

I

The Conference reaffirms the fundamental principles on which the Organisation is based and, in particular, that:

(*a*) labour is not a commodity;
(*b*) freedom of expression and of association are essential to sustained progress;
(*c*) poverty anywhere constitutes a danger to prosperity everywhere;
(*d*) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of Governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

II

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that:

(*a*) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;
(*b*) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;
(*c*) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;
(*d*) it is a responsibility of the International Labour Organisation to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;

(*e*) in discharging the tasks entrusted to it the International Labour Organisation, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

III

The Conference recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve:

(*a*) full employment and the raising of standards of living;
(*b*) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;
(*c*) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;
(*d*) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;
(*e*) the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;
(*f*) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
(*g*) adequate protection for the life and health of workers in all occupations;
(*h*) provision for child welfare and maternity protection;
(*i*) the provision of adequate nutrition, housing and facilities for recreation and culture;
(*j*) the assurance of equality of educational and vocational opportunity.

IV

Confident that the fuller and broader utilisation of the world's productive resources necessary for the achievement of the objectives set forth in this Declaration can be secured by effective international and national action, including measures to expand production and consumption, to avoid severe economic fluctuations, to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international trade, the Conference pledges the full co-operation of the International Labour Organisation with such international bodies as may be entrusted with a share of the responsibility for this great task and for the promotion of the health, education and well-being of all peoples.

V

The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world.

II. *The World Health Organization* (*W.H.O.*)

Formal international co-operation in the field of health dates at least from the first International Sanitary Conference, held under French auspices in 1851, although the first Sanitary Convention was not concluded until 1892. The *Office international d'Hygiène publique* was established in 1907 on the recommendation of the Eleventh Conference (Paris, 1903), and thus somewhat later than the Pan-American Sanitary Bureau, which was first set up in 1901. At the Paris Peace Conference, 1919, a movement to include health matters within the sphere of activity of the League of Nations was instigated by the various national (and non-governmental) Red Cross Societies. This resulted in the inclusion in the Covenant of the clause which was to become Article 25, relating to co-operation with the Red Cross Societies, and also of paragraph (*f*) in Article 23, whereby the Members of the League declared that they would endeavour to take steps in matters of international concern for the prevention and control of disease. A health Congress convened by the British Government in 1919, at which the President of the *Office d'Hygiène* was present, was invited by the League Council to enlarge itself and to draft plans for a permanent health organization which should be responsible for the implementation of the provisions of the Covenant mentioned. The resulting plan, to the adoption of which the effective parties were the Principal Allied and Associated Powers and the International Committee of the Red Cross[1] (these alone having voting powers), contemplated the absorption of the *Office d'Hygiène* into the League machinery in accordance with the provisions of Article 24 of the Covenant. Representatives of the *Office* present at the Congress accepted this plan, as did the League Council and Assembly. The United States, however, which country had in the meantime refused to enter the League, refused to approve the proposed scheme of co-ordination.[2] The idea of making the *Comité permanent* of the *Office* the formal nucleus of the General Committee of the League Health Organisation had therefore to be abandoned. The League proceeded instead to appoint its own Provisional Health Committee. But from the beginning well over half of the persons nominated to the Committee were also national delegates to the *Comité permanent*. Of the others, one was an American and one a German. Representatives of the I.L.O. and the International Committee of the Red Cross also sat on the Committee. And in 1923 a joint Commission of representatives of the League and the *Office* drew up a further scheme which differed little from that advanced in 1919 but which secured acceptance by both sides. As a result, the *Comité permanent* of the *Office* became the General Advisory Conference or Council of the League Health Organization, of which the other organs were the Health Committee, consisting of ten members nominated by the Health Advisory Council, six members appointed by the League Council on the advice of the Health Committee, and eight co-opted assessors, four ranking as members, and the Health Section of the League Secretariat. The Health Organization was one of the most important and successful organs of the League. It was also one of high interest from the point of view of international constitutional law because of the circumstance that its conference was not a League organ at all and its executive committee only partially such. The independence of the latter of the League was most marked. Though the five Great Powers had the right to representation thereon, nationality was never a primary consideration in its constitution. As has been seen, it contained a German national already before it became a permanent organ and at times it had two or even three members of the same nationality. At all times its members were persons with high positions in national health services or of exceptional distinction in the profession of medicine.[3]

Upon the proposal of the delegates of Brazil and China there was inserted in Article 62 of the Charter of the United Nations a provision empowering the Economic and Social Council to make or initiate studies and reports with respect, *inter alia*, to health. And the San Francisco Conference itself adopted a resolution calling for a conference to consider the creation of a new international health organization of world-wide scope. In conformity with this resolution the Economic and Social Council on 12 February 1946 set up a Technical Preparatory Committee composed of representatives of sixteen states and of advisers representative of the League Health Organization, the *Office d'Hygiène*, the Pan-American Sanitary Bureau and U.N.R.R.A. (to which body certain international responsibilities in the field of health had been temporarily entrusted[1]), charged with the preparation of the agenda of the projected conference. This Committee produced a draft constitution for a World Health Organization and recommended the establishment of an Interim Commission to exercise its proposed functions pending the creation of the former. The proposals of the Committee were approved by the drafting committee of the Economic and Social Council and subsequently by the Council itself. They were then transmitted to the International Health Conference, which met at New York in June and July 1946. Sixteen states not belonging to the United Nations, including the lesser enemy or ex-enemy Powers but excluding Spain, were invited to send observers to the Conference, and thirteen of them accepted. Observers were also present on behalf of the Allied Control Authorities for Germany, Japan and Korea, of seven inter-governmental organizations (F.A.O., I.L.O., U.N.E.S.C.O., P.I.C.A.O., U.N.R.R.A., the *Office d'Hygiène*, and the Pan-American Sanitary Bureau), and of three private organizations of international composition or scope (the League of Red Cross Societies, the World Federation of Trade Unions, and the Rockefeller Foundation[2]).

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[1] As to this body see Huber, *Principles and Foundations of the Work of the International Committee of the Red Cross* (1947).

[2] See Eagleton, *International Government* (1932), p. 432.

[3] See, generally, Greaves, *The League Committees and World Order* (1931), pp. 85–110.

The Conference adopted the Constitution which is printed here, together with an Arrangement[3] providing for the establishment of an Interim Commission pending its coming into force, which event will occur when twenty-six Members of the United Nations have accepted it in accordance with its provisions and with their own constitutional processes. The General Assembly by Resolution dated 17 November 1947 recommended the acceptance of the Constitution at the earliest possible date.[4] The Conference requested the Secretary-General to take steps for the transfer to the Interim Commission of the functions of the League Health Organization and in addition adopted a Protocol providing for the supersession of the *Office d'Hygiène*.[5] It may be noted in passing that the General Assembly has authorized the transfer to the Interim Commission of certain assets enjoyed by the former League Health Organization (Resolution dated 17 November 1947)[6] the personnel of which has passed already into the service of the Interim Commission.[7]

The Constitution of W.H.O. would be interesting whatever its provisions in that it is that of the first specialized agency to be created upon the initiative of the United Nations itself in conformity with Article 59 of the Charter. It makes reference to the parent body no less than twenty-three times. Many of its procedural provisions are reproduced directly from the Charter, notably those relating to voting (Chap. XIII).[8] The Secretary-General of the United Nations is, too, assigned certain functions under the Constitution (Arts. 15, 68, 81, and 82). The Director-General of the Organization, on the other hand, is accorded a peculiarly limited discretion and is no more than the first servant of the Executive Board (Chap. VII). But the liberty accorded him to secure by agreement with Members direct access to departments of national Governments and to both governmental and non-governmental health organizations is an innovation worthy of note (Art. 33). There is, of course, as has been pointed out, a long tradition of international co-operation in the field of health. Such co-operation has been achieved as much through private as through official endeavour and this is likely to continue to be the case. For W.H.O. to ignore unofficial health organizations would clearly be irrational.

As was frequently pointed out at the New York Health Conference, disease respects neither protocol nor frontiers. A single and universal health organization is thus not merely the ideal but the only practical one. The provisions of the Constitution as to the membership of W.H.O., which is declared in Article 3 to be 'open to all States', did not, however, reach their final form without serious debate. As has been seen, the lesser enemy or ex-enemy Powers were present at New York by their observers, as were also the Allied Control Authorities for Germany and Japan. There was a species of precedent for their admission to membership of the Organization in the appointment of a German and an American national to the League's Provisional Health Committee in 1921. But, though that 'germs carry no passports' was freely admitted, a majority of delegates was opposed to the adoption of any regulations as to membership which would have permitted the entry of Spain, against which country the General Assembly itself had so recently closed the door.[1] In spite, therefore, of Article 3, states neither members of the United Nations nor represented at New York may become Members of W.H.O. only upon approval of their application to join by a majority of the Health Assembly (the plenary organ). And even this restricted liberty is made expressly subject to the conditions of any agreement between the United Nations and the Organization (Art. 6). But these provisions have to be read in the light of the circumstances already mentioned, that the lesser enemy or ex-enemy Powers were invited to New York and (with the exception of Rumania) were in fact present there, so that their right to accept the Constitution is absolute (Art. 5).

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[1] See this *Year Book*, 23 (1946), p. 495.

[2] As to the relations between this body and the League Health Organisation see Greaves, op. cit., p. 103.

[3] *Final Acts of the International Health Conference*, United Nations, 1946, p. 33.

[4] *Resolutions of the Second Regular Session*, p. 29.

[5] *Final Acts of the International Health Conference*, p. 45.

[6] *Resolutions of the Second Regular Session*, p. 31.

[7] See the Arrangement referred to, para. 6, and compare Sharp, 'The New World Health Organisation', in *American Journal of International Law*, 41 (1947), pp. 509, 511.

[8] See Art. 18 of the Charter and Sharp, op. cit., p. 527.

The Constitution contains also a provision regarding membership of the Organization which would appear to be in a sense an innovation in international institutional law and practice. This is the provision in Article 8 permitting the admission to Associate Membership of 'territories or groups of territories which are not responsible for the conduct of their international relations . . . upon application by the Member or other authority having responsibility for their international relations'. Associate Members are to have such rights and obligations as the Health Assembly may determine. Their representatives in that body ought to be chosen from the native population. Upon Article 8 it may be observed in passing that the words 'or other authority' therein were inserted by a special drafting sub-committee of the New York Conference in order to make it possible for trust territories under direct United Nations administration to be admitted as Associate Members.[2] They would appear, however, to create the possibility of the admission also of Germany and Japan. Upon the device of Associate Membership which the Article introduces it may be said that, though its net effect will be little (if at all) different, it is distinct in principle both from that whereby non-self-governing territories are admitted to full membership of such international organizations as the Universal Postal Union and representatives of such territories are chosen in their discretion by the sovereigns concerned, and from that whereby, as under the revised Constitution of the I.L.O.,[3] Members of international organizations responsible for the international relations of non-metropolitan territories are empowered to nominate representatives of such territories as additional advisers to their delegates.

The New York Conference had no difficulty in reaching agreement on the transfer of the functions of the League Health Organization, of the *Office d'Hygiène*, and (in so far as they related to health) of U.N.R.R.A., to the new Organization. For the League was already in process of liquidation, as also was U.N.R.R.A., whose health activities were in any case but temporary.[4] And the *Office d'Hygiène*, as has been seen, was an integral part of the League Organization and would have been replaced thereby but for the objections raised by the United States in 1921. But the case of the Pan-American Sanitary Organization presented some difficulty, again because of the attitude of the United States, which the Latin-American states endorsed. A special 'harmonizing' sub-committee had to be set up in order to resolve the difference between the American states, which expressed an understandable concern lest the work of that justly reputable organization should suffer by reason of its liquidation, and the equally understandable 'all or nothing' thesis of certain non-American states. A studiously vague compromise was ultimately achieved, Chapter XI of the draft constitution empowering the Health Assembly in general to set up regional organizations where desirable as 'integral parts' *of* W.H.O., and Article 54 providing that the Pan-American organization should 'in due course be integrated *with*' that body.[1]

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[1] See Resolution of 9 February 1946: *Proceedings of the General Assembly, First Part of First Session* (H.M.S.O., 1946), Annex 19.

[2] See Sharp, op. cit., pp. 515-16.

[3] Art. 3 (3), *supra*, p. 435.

[4] See this *Year Book*, 23 (1946), p. 495.

The Constitution of W.H.O. envisages an Organization with a plenary Assembly as its policy-making organ, and an Executive Board of eighteen persons 'technically qualified in the field of health', designated by as many Members, themselves to be chosen by the Health Assembly with due regard to geography. These organs, with the Secretariat, correspond closely to those of the former League Health Organization. But it is to be noted that the members of the Executive Board, though they should be technically qualified, will be primarily representatives of Governments instead of doctors, as were the members of the old League Health Committee. It is perhaps a matter for regret that the framers of the Constitution did not adopt some device for the direct representation and participation of the medical profession in W.H.O. (one of the functions of which is, incidentally, the promotion of improved standards of teaching and training in that and related professions[2]). It might be thought that health, no less than education,[3] is a field in which the principle of the direct representation of those expert in, or most closely affected by, the work of an international organization—a principle put into practice with great success in the constitution of the I.L.O.—ought to apply. In another matter, however, the Constitution of W.H.O. does follow that of the I.L.O. For under Article 19 the Health Assembly is to have authority to adopt conventions with respect to any matter within the competence of the organization and, under the succeeding Article, Members are to undertake within eighteen months to 'take action relative to the acceptance' of such conventions and, if they do not proceed to acceptance, to state their reasons for not doing so. By Article 21 the Health Assembly is to have authority to adopt regulations of a procedural nature (relating, for instance, to the labelling of pharmaceutical products), and these are to be binding on Members, unless affirmatively rejected by them. Power to make recommendations is also to be given[4] and fairly comprehensive obligations to make periodical reports of various kinds are to be laid on Members.[5] The obvious source of these provisions is the Constitution of the I.L.O., though, of course, they are not as far-reaching in effect as the prototypical stipulations.[6]

The Constitution of W.H.O. is not an original instrument. It bears traces of resort by its authors to the texts of several earlier constitutions. Were there in existence a complete model constitution, and were the requirements of international organizations in regard to their constitutions identical, this would be no disadvantage. But the needs of organizations are as diverse as their aims and a certain constitutional flexibility is essential to their proper growth. Furthermore, it may be suspected that an unreflecting reliance upon existing forms has, in the case of W.H.O., resulted in the inclusion in its Constitution of provisions not wholly consistent with one another. The whole scheme of the Organization is unclear. Its plenary organ is endowed with quasi-legislative powers somewhat after the fashion of the International Labour Conference. Yet the adequate representation within it of technical skill is not provided for with absolute certainty. Nor is the paramountcy of the responsibility of the Executive Board to the plenary organ over that of the members of the former to their Governments made plain. Nor yet is the Director-General given any mandate in regard to the study of fields for possible legislation. On

[1] See, generally, Sharp, op. cit., pp. 516–19.

[2] Art. 2 (*o*).

[3] See this *Year Book*, 23 (1946), p. 423.

[4] Art. 23.

[5] Chapter XIV.

[6] Compare Art. 19 of the Constitution of the I.L.O., *ante*, p. 439.

the other hand, extraordinarily comprehensive provision for co-operation with other organizations, international and national, official and unofficial, is made. The Constitution abounds in technical devices which recent experience has proved to be useful—such as the requirement that Members must 'contract out' rather than 'contract in' in relation to regulations made by the Organization (Art. 22), the adoption of standard staff regulations (Arts. 23–7), the provision for the periodical review of machinery (Art. 39), and the incorporation of what may be called 'United Nations articles' respecting voting (Chap. XIII), privileges and immunities (Chap. XV), relations with other organizations (Chap. XVI), amendments (Chap. XVII), and interpretation (Chap. XVIII). But it lacks coherence and unity. In part, this is perhaps to be explained by the circumstance that the original draft, upon which the New York Conference largely relied,[1] was apparently made with little or no assistance from persons experienced in draftsmanship.[2] In part, it would seem to be a result of the circumstance that the elaboration of the aims of the new organization was undertaken simultaneously with that of its constitution without there being any opportunity for reflection upon their interaction. The New York Conference was not content that the World Health Organization should merely carry on the work of the organizations it is to replace. It saw health not as the state resulting from prevention and combat of disease but as a positive 'state of complete physical, mental, and social well-being', and the supreme aim of the Organization as the attainment 'by all peoples of the highest possible level of health'. Yet it invested the Organization with little, if any, more power than its predecessors, and was content to impose upon its Members very little in the way of positive obligation. It is questionable whether this policy was not fundamentally inconsistent. It might possibly have been better had the questions of ends and means been dealt with separately. In this connexion it is relevant to remark that the revision of the aims of the I.L.O., and the effecting of the constitutional change rendered necessary thereby, were entirely distinct processes. An improved standard of international draftsmanship, such as the Constitution of W.H.O. reflects, is highly desirable. But the 'refinements of courts' are shadows unless imagination illuminates them.

CONSTITUTION OF THE WORLD HEALTH ORGANIZATION

The States parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

The achievement of any State in the promotion and protection of health is of value to all.

Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.

Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.

The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.

Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.

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[1] See Sharp, op. cit., p. 511.

[2] See *Report of the Technical Preparatory Committee, Official Records of the Economic and Social Council*, First Year, Second Session, Annex 1.

Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

Accepting these principles, and for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the contracting parties agree to the present Constitution and hereby establish the World Health Organization as a specialized agency within the terms of Article 57 of The Charter of the United Nations.

CHAPTER I. OBJECTIVE

Article 1

The objective of the World Health Organization (hereinafter called the Organization) shall be the attainment by all peoples of the highest possible level of health.

CHAPTER II. FUNCTIONS

Article 2

In order to achieve its objective, the functions of the Organization shall be:

(*a*) to act as the directing and co-ordinating authority on international health work;

(*b*) to establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organizations as may be deemed appropriate;

(*c*) to assist governments, upon request, in strengthening health services;

(*d*) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of governments;

(*e*) to provide or assist in providing, upon the request of the United Nations, health services and facilities to special groups, such as the peoples of trust territories;

(*f*) to establish and maintain such administrative and technical services as may be required, including epidemiological and statistical services;

(*g*) to stimulate and advance work to eradicate epidemic, endemic and other diseases;

(*h*) to promote, in co-operation with other specialized agencies where necessary, the prevention of accidental injuries;

(*i*) to promote, in co-operation with other specialized agencies where necessary, the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene;

(*j*) to promote co-operation among scientific and professional groups which contribute to the advancement of health;

(*k*) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective;

(*l*) to promote maternal and child health and welfare and to foster the ability to live harmoniously in a changing total environment;

(*m*) to foster activities in the field of mental health, especially those affecting the harmony of human relations;

(*n*) to promote and conduct research in the field of health;

(*o*) to promote improved standards of teaching and training in the health, medical and related professions;

(*p*) to study and report on, in co-operation with other specialized agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital services and social security;

(*q*) to provide information, counsel and assistance in the field of health;

(*r*) to assist in developing an informed public opinion among all peoples on matters of health;

(*s*) to establish and revise as necessary international nomenclatures of diseases, of causes of death and of public health practices;

(*t*) to standardize diagnostic procedures as necessary;

(*u*) to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products;
(*v*) generally to take all necessary action to attain the objective of the Organization.

CHAPTER III. MEMBERSHIP AND ASSOCIATE MEMBERSHIP

Article 3

Membership in the Organization shall be open to all States.

Article 4

Members of the United Nations may become Members of the Organization by signing or otherwise accepting this Constitution in accordance with the provisions of Chapter XIX and in accordance with their constitutional processes.

Article 5

The States whose governments have been invited to send observers to the International Health Conference held in New York, 1946, may become Members by signing or otherwise accepting this Constitution in accordance with the provisions of Chapter XIX and in accordance with their constitutional processes provided that such signature or acceptance shall be completed before the first session of the Health Assembly.

Article 6

Subject to the conditions of any agreement between the United Nations and the Organization, approved pursuant to Chapter XVI, States which do not become Members in accordance with Articles 4 and 5 may apply to become Members and shall be admitted as Members when their application has been approved by a simple majority vote of the Health Assembly.

Article 7

If a Member fails to meet its financial obligations to the Organization or in other exceptional circumstances the Health Assembly may, on such conditions as it thinks proper, suspend the voting privileges and services to which a Member is entitled. The Health Assembly shall have the authority to restore such voting privileges and services.

Article 8

Territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as Associate Members by the Health Assembly upon application made on behalf of such territory or group of territories by the Member or other authority having responsibility for their international relations. Representatives of Associate Members to the Health Assembly should be qualified by their technical competence in the field of health and should be chosen from the native population. The nature and extent of the rights and obligations of Associate Members shall be determined by the Health Assembly.

CHAPTER IV. ORGANS

Article 9

The work of the Organization shall be carried out by:
(*a*) The World Health Assembly (herein called the Health Assembly);
(*b*) The Executive Board (hereinafter called the Board);
(*c*) The Secretariat.

CHAPTER V. THE WORLD HEALTH ASSEMBLY

Article 10

The Health Assembly shall be composed of delegates representing Members.

Article 11

Each Member shall be represented by not more than three delegates, one of whom shall be designated by the Member as chief delegate. These delegates should be chosen from among persons most qualified by their technical competence in the field of health, preferably representing the national health administration of the Member.

Article 12

Alternates and advisers may accompany delegates.

Article 13

The Health Assembly shall meet in regular annual session and in such special sessions as may be necessary. Special sessions shall be convened at the request of the Board or of a majority of the Members.

Article 14

The Health Assembly, at each annual session, shall select the country or region in which the next annual session shall be held, the Board subsequently fixing the place. The Board shall determine the place where a special session shall be held.

Article 15

The Board, after consultation with the Secretary-General of the United Nations, shall determine the date of each annual and special session.

Article 16

The Health Assembly shall elect its President and other officers at the beginning of each annual session. They shall hold office until their successors are elected.

Article 17

The Health Assembly shall adopt its own rules of procedure.

Article 18

The functions of the Health Assembly shall be:

(*a*) to determine the policies of the Organization;

(*b*) to name the Members entitled to designate a person to serve on the Board;

(*c*) to appoint the Director-General;

(*d*) to review and approve reports and activities of the Board and of the Director-General and to instruct the Board in regard to matters upon which action, study, investigation or report may be considered desirable;

(*e*) to establish such committees as may be considered necessary for the work of the Organization;

(*f*) to supervise the financial policies of the Organization and to review and approve the budget;

(*g*) to instruct the Board and the Director-General to bring to the attention of Members and of international organizations, governmental or non-governmental, any matter with regard to health which the Health Assembly may consider appropriate;

(*h*) to invite any organization, international or national, governmental or non-governmental, which has responsibilities related to those of the Organization, to appoint representatives to participate, without right of vote, in its meetings or in those of the committees and conferences convened under its authority, on conditions prescribed by the Health Assembly; but in the case of national organizations, invitations shall be issued only with the consent of the government concerned;

(*i*) to consider recommendations bearing on health made by the General Assembly, the Economic and Social Council, the Security Council or Trusteeship Council of the United Nations, and to report to them on the steps taken by the Organization to give effect to such recommendations;

(*j*) to report to the Economic and Social Council in accordance with any agreement between the Organization and the United Nations;
(*k*) to promote and conduct research in the field of health by the personnel of the Organization, by the establishment of its own institutions or by co-operation with official or non-official institutions of any Member with the consent of its government.
(*l*) to establish such other institutions as it may consider desirable.
(*m*) to take any other appropriate action to further the objective of the Organization.

Article 19

The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization. A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements which shall come into force for each Member when accepted by it in accordance with its constitutional processes.

Article 20

Each Member undertakes that it will, within eighteen months after the adoption by the Health Assembly of a convention or agreement, take action relative to the acceptance of such convention or agreement. Each Member shall notify the Director-General of the action taken and if it does not accept such convention or agreement within the time limit, it will furnish a statement of the reasons for non-acceptance. In case of acceptance, each Member agrees to make an annual report to the Director-General in accordance with Chapter XIV.

Article 21

The Health Assembly shall have authority to adopt regulations concerning:
(*a*) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease;
(*b*) nomenclatures with respect to diseases, causes of death and public health practices;
(*c*) standards with respect to diagnostic procedures for international use;
(*d*) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce;
(*e*) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.

Article 22

Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.

Article 23

The Health Assembly shall have authority to make recommendations to Members with respect to any matter within the competence of the Organization.

CHAPTER VI. THE EXECUTIVE BOARD

Article 24

The Board shall consist of eighteen persons designated by as many Members. The Health Assembly, taking into account an equitable geographical distribution, shall elect the Members entitled to designate a person to serve on the Board. Each of these Members should appoint to the Board a person technically qualified in the field of health, who may be accompanied by alternates and advisers.

Article 25

These Members shall be elected for three years and may be re-elected; provided that of the Members elected at the first session of the Health Assembly, the terms of six Members shall be for one year and the terms of six Members shall be for two years, as determined by lot.

Article 26

The Board shall meet at least twice a year and shall determine the place of each meeting.

Article 27

The Board shall elect its Chairman from among its members and shall adopt its own rules of procedure.

Article 28

The functions of the Board shall be:

(*a*) to give effect to the decisions and policies of the Health Assembly;
(*b*) to act as the executive organ of the Health Assembly;
(*c*) to perform any other functions entrusted to it by the Health Assembly;
(*d*) to advise the Health Assembly on questions referred to it by that body and on matters assigned to the Organization by conventions, agreements and regulations;
(*e*) to submit advice or proposals to the Health Assembly on its own initiative;
(*f*) to prepare the agenda of meetings of the Health Assembly;
(*g*) to submit to the Health Assembly for consideration and approval a general programme of work covering a specific period;
(*h*) to study all questions within its competence;
(*i*) to take emergency measures within the functions and financial resources of the Organization to deal with events requiring immediate action. In particular it may authorize the Director-General to take the necessary steps to combat epidemics, to participate in the organization of health relief to victims of a calamity and to undertake studies and research the urgency of which has been drawn to the attention of the Board by any Member or by the Director-General.

Article 29

The Board shall exercise on behalf of the whole Health Assembly the powers delegated to it by that body.

CHAPTER VII. THE SECRETARIAT

Article 30

The Secretariat shall comprise the Director-General and such technical and administrative staff as the Organization may require.

Article 31

The Director-General shall be appointed by the Health Assembly on the nomination of the Board on such terms as the Health Assembly may determine. The Director-General, subject to the authority of the Board, shall be the chief technical and administrative officer of the Organization.

Article 32

The Director-General shall be *ex officio* Secretary of the Health Assembly, of the Board, of all commissions and committees of the Organization and of conferences convened by it. He may delegate these functions.

Article 33

The Director-General or his representative may establish a procedure by agreement with Members, permitting him, for the purpose of discharging his duties, to have direct access to their various departments, especially to their health administrations and to national health organizations, governmental or non-governmental. He may also establish direct relations with international organizations whose activities come within the competence of the Organization. He shall keep Regional Offices informed on all matters involving their respective areas.

Article 34

The Director-General shall prepare and submit annually to the Board the financial statements and budget estimates of the Organization.

Article 35

The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations established by the Health Assembly. The paramount consideration in the employment of the staff shall be to assure that the efficiency, integrity and internationally representative character of the Secretariat shall be maintained at the highest level. Due regard shall be paid also to the importance of recruiting the staff on as wide a geographical basis as possible.

Article 36

The conditions of service of the staff of the Organization shall conform as far as possible with those of other United Nations organizations.

Article 37

In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any government or from any authority external to the Organization. They shall refrain from any action which might reflect on their position as international officers. Each Member of the Organization on its part undertakes to respect the exclusively international character of the Director-General and the staff and not to seek to influence them.

CHAPTER VIII. COMMITTEES

Article 38

The Board shall establish such committees as the Health Assembly may direct and, on its own initiative or on the proposal of the Director-General, may establish any other committees considered desirable to serve any purpose within the competence of the Organization.

Article 39

The Board, from time to time and in any event annually, shall review the necessity for continuing each committee.

Article 40

The Board may provide for the creation of or the participation by the Organization in joint or mixed committees with other organizations and for the representation of the Organization in committees established by such other organizations.

CHAPTER IX. CONFERENCES

Article 41

The Health Assembly or the Board may convene local, general, technical or other special conferences to consider any matter within the competence of the Organization and may provide for the representation at such conferences of international organizations and, with the consent of the government concerned, of national organizations, governmental or non-governmental. The manner of such representation shall be determined by the Health Assembly or the Board.

Article 42

The Board may provide for representation of the Organization at conferences in which the Board considers that the Organization has an interest.

CHAPTER X. HEADQUARTERS

Article 43

The location of the headquarters of the Organization shall be determined by the Health Assembly after consultation with the United Nations.

CHAPTER XI. REGIONAL ARRANGEMENTS

Article 44

(*a*) The Health Assembly shall from time to time define the geographical areas in which it is desirable to establish a regional organization.

(*b*) The Health Assembly may, with the consent of a majority of the Members situated within each area so defined, establish a regional organization to meet the special needs of such area. There shall not be more than one regional organization in each area.

Article 45

Each regional organization shall be an integral part of the Organization in accordance with this Constitution.

Article 46

Each regional organization shall consist of a Regional Committee and a Regional Office.

Article 47

Regional Committees shall be composed of representatives of the Member States and Associate Members in the region concerned. Territories or groups of territories within the region, which are not responsible for the conduct of their international relations and which are not Associate Members, shall have the right to be represented and to participate in Regional Committees. The nature and extent of the rights and obligations of these territories or groups of territories in Regional Committees shall be determined by the Health Assembly in consultation with the Member or other authority having responsibility for the international relations of these territories and with the Member States in the region.

Article 48

Regional Committees shall meet as often as necessary and shall determine the place of each meeting.

Article 49

Regional Committees shall adopt their own rules of procedure.

Article 50

The functions of the Regional Committee shall be:

(*a*) to formulate policies governing matters of an exclusively regional character;

(*b*) to supervise the activities of the Regional Office;

(*c*) to suggest to the Regional Office the calling of technical conferences and such additional work or investigation in health matters as in the opinion of the Regional Committee would promote the objective of the Organization within the region;

(*d*) to co-operate with the respective regional committees of the United Nations and with those of other specialized agencies and with other regional international organizations having interests in common with the Organization;

(*e*) to tender advice, through the Director-General, to the Organization on international health matters which have wider than regional significance;

(*f*) to recommend additional regional appropriations by the governments of the respective regions if the proportion of the central budget of the Organization allotted to that region is insufficient for the carrying out of the regional functions;

(*g*) such other functions as may be delegated to the Regional Committee by the Health Assembly, the Board or the Director-General.

Article 51

Subject to the general authority of the Director-General of the Organization, the Regional Office shall be the administrative organ of the Regional Committee. It shall, in addition, carry out within the region the decisions of the Health Assembly and of the Board.

Article 52

The head of the Regional Office shall be the Regional Director appointed by the Board in agreement with the Regional Committee.

Article 53

The staff of the Regional Office shall be appointed in a manner to be determined by agreement between the Director-General and the Regional Director.

Article 54

The Pan-American sanitary organization represented by the Pan-American Sanitary Bureau and the Pan-American Sanitary Conferences, and all other inter-governmental regional health organizations in existence prior to the date of signature of this Constitution, shall in due course be integrated with the Organization. This integration shall be effected as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organizations concerned.

CHAPTER XII. BUDGET AND EXPENSES

Article 55

The Director-General shall prepare and submit to the Board the annual budget estimates of the Organization. The Board shall consider and submit to the Health Assembly such budget estimates, together with any recommendations the Board may deem advisable.

Article 56

Subject to any agreement between the Organization and the United Nations, the Health Assembly shall review and approve the budget estimates and shall apportion the expenses among the Members in accordance with a scale to be fixed by the Health Assembly.

Article 57

The Health Assembly or the Board acting on behalf of the Health Assembly may accept and administer gifts and bequests made to the Organization provided that the conditions attached to such gifts or bequests are acceptable to the Health Assembly or the Board and are consistent with the objective and policies of the Organization.

Article 58

A special fund to be used at the discretion of the Board shall be established to meet emergencies and unforeseen contingencies.

CHAPTER XIII. VOTING

Article 59

Each Member shall have one vote in the Health Assembly.

Article 60

(*a*) Decisions of the Health Assembly on important questions shall be made by a two-thirds majority of the Members present and voting. These questions shall include: the adoption of conventions or agreements; the approval of agreements bringing the Organization into relation with the United Nations and inter-governmental organizations and agencies in accordance with Articles 69, 70 and 72; amendments to this Constitution.

(*b*) Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the Members present and voting.

(*c*) Voting on analogous matters in the Board and in committees of the Organization shall be made in accordance with paragraphs (*a*) and (*b*) of this Article.

Chapter XIV. Reports submitted by States

Article 61

Each Member shall report annually to the Organization on the action taken and progress achieved in improving the health of its people.

Article 62

Each Member shall report annually on the action taken with respect to recommendations made to it by the Organization and with respect to conventions, agreements and regulations.

Article 63

Each Member shall communicate promptly to the Organization important laws, regulations, official reports and statistics pertaining to health which have been published in the State concerned.

Article 64

Each Member shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly.

Article 65

Each Member shall transmit upon the request of the Board such additional information pertaining to health as may be practicable.

Chapter XV. Legal Capacity, Privileges and Immunities

Article 66

The Organization shall enjoy in the territory of each Member such legal capacity as may be necessary for the fulfilment of its objective and for the exercise of its functions.

Article 67

(*a*) The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions.

(*b*) Representatives of Members, persons designated to serve on the Board and technical and administrative personnel of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Article 68

Such legal capacity, privileges and immunities shall be defined in a separate agreement to be prepared by the Organization in consultation with the Secretary-General of the United Nations and concluded between the Members.

CHAPTER XVI. RELATIONS WITH OTHER ORGANIZATIONS

Article 69

The Organization shall be brought into relation with the United Nations as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations. The agreement or agreements bringing the Organization into relation with the United Nations shall be subject to approval by a two-thirds vote of the Health Assembly.

Article 70

The Organization shall establish effective relations and co-operate closely with such other inter-governmental organizations as may be desirable. Any formal agreement entered into with such organizations shall be subject to approval by a two-thirds vote of the Health Assembly.

Article 71

The Organization may, on matters within its competence, make suitable arrangements for consultation and co-operation with non-governmental international organizations and, with the consent of the government concerned, with national organizations, governmental or non-governmental.

Article 72

Subject to the approval by a two-thirds vote of the Health Assembly, the Organization may take over from any other international organization or agency whose purpose and activities lie within the field of competence of the Organization such functions, resources and obligations as may be conferred upon the Organization by international agreement or by mutually acceptable arrangements entered into between the competent authorities of the respective organizations.

CHAPTER XVII. AMENDMENTS

Article 73

Texts of proposed amendments to this Constitution shall be communicated by the Director-General to Members at least six months in advance of their consideration by the Health Assembly. Amendments shall come into force for all Members when adopted by a two-thirds vote of the Health Assembly and accepted by two-thirds of the Members in accordance with their respective constitutional processes.

CHAPTER XVIII. INTERPRETATION

Article 74

The Chinese, English, French, Russian and Spanish texts of this Constitution shall be regarded as equally authentic.

Article 75

Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

Article 76

Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization.

Article 77

The Director-General may appear before the Court on behalf of the Organization in connection with any proceedings arising out of any such request for an advisory opinion.

He shall make arrangements for the presentation of the case before the Court including arrangements for the argument of different views on the question.

CHAPTER XIX. ENTRY INTO FORCE

Article 78

Subject to the provisions of Chapter III, this Constitution shall remain open to all States for signature or acceptance.

Article 79

(*a*) States may become parties to this Constitution by
  (i) signature without reservation as to approval;
  (ii) signature subject to approval followed by acceptance; or
  (iii) acceptance.

(*b*) Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

Article 80

This Constitution shall come into force when twenty-six Members of the United Nations have become parties to it in accordance with the provisions of Article 79.

Article 81

In accordance with Article 102 of the Charter of the United Nations, the Secretary-General of the United Nations will register this Constitution when it has been signed without reservation as to approval on behalf of one State or upon deposit of the first instrument of acceptance.

Article 82

The Secretary-General of the United Nations will inform States parties to this Constitution of the date when it has come into force. He will also inform them of the dates when other States have become parties to this Constitution.[1]

III. *The International Bank for Reconstruction and Development*

A note introductory to the Constitution of this organization, for the text of which there was, unfortunately, insufficient space, was printed in the last volume of the *Year Book*.[2]

ARTICLES OF AGREEMENT OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

The Governments on whose behalf the present Agreement is signed agree as follows:

INTRODUCTORY ARTICLE

The International Bank for Reconstruction and Development is established and shall operate in accordance with the following provisions:

ARTICLE I. *Purposes*

The purposes of the Bank are:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

(ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.

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[1] Text taken from *Final Acts of the International Health Organisation*, United Nations, 1946.

[2] Vol. 23 (1946), pp. 432–3.

(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories.

(iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.

(v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate post-war years, to assist in bringing about a smooth transition from a wartime to a peacetime economy.

The Bank shall be guided in all its decisions by the purposes set forth above.

ARTICLE II. *Membership in and Capital of the Bank*

Section 1. *Membership*

(*a*) The original members of the Bank shall be those members of the International Monetary Fund[1] which accept membership in the Bank before the date specified in Article XI, Section 2 (*e*).

(*b*) Membership shall be open to other members of the Fund, at such times and in accordance with such terms as may be prescribed by the Bank.

Section 2. *Authorised capital*

(*a*) The authorised capital stock of the Bank shall be $10,000,000,000, in terms of United States dollars of the weight and fineness in effect on the 1st July, 1944. The capital stock shall be divided into 100,000 shares having a par value of $100,000 each, which shall be available for subscription only by members.

(*b*) The capital stock may be increased when the Bank deems it advisable by a three-fourths majority of the total voting power.

Section 3. *Subscription of shares*

(*a*) Each member shall subscribe shares of the capital stock of the Bank. The minimum number of shares to be subscribed by the original members shall be those set forth in Schedule A. The minimum number of shares to be subscribed by other members shall be determined by the Bank, which shall reserve a sufficient portion of its capital stock for subscription by such members.

(*b*) The Bank shall prescribe rules laying down the conditions under which members may subscribe shares of the authorised capital stock of the Bank in addition to their minimum subscriptions.

(*c*) If the authorised capital stock of the Bank is increased, each member shall have a reasonable opportunity to subscribe, under such conditions as the Bank shall decide, a proportion of the increase of stock equivalent to the proportion which its stock theretofore subscribed bears to the total capital stock of the Bank, but no member shall be obligated to subscribe any part of the increased capital.

Section 4. *Issue price of shares*

Shares included in the minimum subscriptions of original members shall be issued at par. Other shares shall be issued at par unless the Bank by a majority of the total voting power decides in special circumstances to issue them on other terms.

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[1] As to membership of the Fund see Article 2 of the Constitution thereof and this *Year Book*, 23 (1946), pp. 430–1.

Section 5. *Division and calls of subscribed capital*

The subscription of each member shall be divided into two parts as follows:

(i) twenty per cent. shall be paid or subject to call under Section 7 (i) of this Article as needed by the Bank for its operations;

(ii) the remaining eighty per cent. shall be subject to call by the Bank only when required to meet obligations of the Bank created under Article IV, Sections 1 (*a*) (ii) and (iii).

Calls on unpaid subscriptions shall be uniform on all shares.

Section 6. *Limitation on liability*

Liability on shares shall be limited to the unpaid portion of the issue price of the shares.

Section 7. *Method of payment of subscriptions for shares*

Payment of subscriptions for shares shall be made in gold or United States dollars and in the currencies of the members as follows:

(i) under Section 5 (i) of this Article, two per cent. of the price of each share shall be payable in gold or United States dollars, and, when calls are made, the remaining eighteen per cent. shall be paid in the currency of the member;

(ii) when a call is made under Section 5 (ii) of this Article, payment may be made at the option of the member either in gold, United States dollars or in the currency required to discharge the obligations of the Bank for the purpose for which the call is made;

(iii) when a member makes payments in any currency under (i) and (ii) above, such payments shall be made in amounts equal in value to the member's liability under the call. This liability shall be a proportionate part of the subscribed capital stock of the Bank as authorised and defined in Section 2 of this Article.

Section 8. *Time of payment of subscriptions*

(*a*) The two per cent. payable on each share in gold or United States dollars under Section 7 (i) of this Article, shall be paid within sixty days of the date on which the Bank begins operations, provided that (i) any original member of the Bank whose metropolitan territory has suffered from enemy occupation or hostilities during the present war shall be granted the right to postpone payment of one-half per cent. until five years after that date; (ii) an original member who cannot make such a payment because it has not recovered possession of its gold reserves which are still seized or immobilised as a result of the war may postpone all payment until such date as the Bank shall decide.

(*b*) The remainder of the price of each share payable under Section 7 (i) of this Article shall be paid as and when called by the Bank, provided that—

(i) the Bank shall, within one year of its beginning operations, call not less than eight per cent. of the price of the share in addition to the payment of two per cent. referred to in (*a*) above;

(ii) not more than five per cent. of the price of the share shall be called in any period of three months.

Section 9. *Maintenance of value of certain currency holdings of the Bank*

(*a*) Whenever (i) the par value of a member's currency is reduced, or (ii) the foreign exchange value of a member's currency has, in the opinion of the Bank, depreciated to a significant extent within that member's territories, the member shall pay to the Bank within a reasonable time an additional amount of its own currency sufficient to maintain the value, as of the time of initial subscription, of the amount of the currency of such member, which is held by the Bank and derived from currency originally paid in to the Bank by the member under Article II, Section 7 (i), from currency referred to in Article IV, Section 2 (*b*), or from any additional currency furnished under the provisions of the present paragraph, and which has not been re-purchased by the member for gold or for the currency of any member which is acceptable to the Bank.

(*b*) Whenever the par value of a member's currency is increased, the Bank shall return to such member within a reasonable time an amount of that member's currency equal to the increase in the value of the amount of such currency described in (*a*) above.

(*c*) The provisions of the preceding paragraphs may be waived by the Bank when a uniform proportionate change in the par values of the currencies of all its members is made by the International Monetary Fund.

Section 10. *Restriction on disposal of shares*

Shares shall not be pledged or encumbered in any manner whatever and they shall be transferable only to the Bank.

Article III. *General Provisions relating to Loans and Guarantees*

Section 1. *Use of resources*

(*a*) The resources and the facilities of the Bank shall be used exclusively for the benefit of members with equitable consideration to projects for development and projects for reconstruction alike.

(*b*) For the purpose of facilitating the restoration and reconstruction of the economy of members whose metropolitan territories have suffered great devastation from enemy occupation or hostilities, the Bank, in determining the conditions and terms of loans made to such members, shall pay special regard to lightening the financial burden and expediting the completion of such restoration and reconstruction.

Section 2. *Dealings between members and the Bank*

Each member shall deal with the Bank only through its Treasury, central bank, stabilization fund or other similar fiscal agency, and the Bank shall deal with members only by or through the same agencies.

Section 3. *Limitations on guarantees and borrowings of the Bank*

The total amount outstanding of guarantees, participations in loans and direct loans made by the Bank shall not be increased at any time, if by such increase the total would exceed one hundred per cent. of the unimpaired subscribed capital, reserves and surplus of the Bank.

Section 4. *Conditions on which the Bank may guarantee or make loans*

The Bank may guarantee, participate in, or make loans to any member or any political sub-division thereof and any business, industrial, and agricultural enterprise in the territories of a member, subject to the following conditions:

(1) When the member in whose territories the project is located is not itself the borrower, the member or the central bank or some comparable agency of the member which is acceptable to the Bank, fully guarantees the repayment of the principal and the payment of interest and other charges on the loan.

(2) The Bank is satisfied that in the prevailing market conditions the borrower would be unable otherwise to obtain the loan under conditions which in the opinion of the Bank are reasonable for the borrower.

(3) A competent committee, as provided for in Article V, Section 7, has submitted a written report recommending the project after a careful study of the merits of the proposal.

(4) In the opinion of the Bank the rate of interest and other charges are reasonable and such rate, charges and the schedule for repayment of principal are appropriate to the project.

(5) In making or guaranteeing a loan, the Bank shall pay due regard to the prospects that the borrower, and, if the borrower is not a member, that the guarantor, will be in position to meet its obligations under the loan; and the Bank shall act prudently in the interests both of the particular member in whose territories the project is located and of the members as a whole.

(6) In guaranteeing a loan made by other investors, the Bank receives suitable compensation for its risk.

(7) Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development.

Section 5. *Use of loans guaranteed, participated in or made by the Bank*

(*a*) The Bank shall impose no conditions that the proceeds of a loan shall be spent in the territories of any particular member or members.

(*b*) The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.

(*c*) In the case of loans made by the Bank, it shall open an account in the name of the borrower and the amount of the loan shall be credited to this account in the currency or currencies in which the loan is made. The borrower shall be permitted by the Bank to draw on this account only to meet expenses in connection with the project as they are actually incurred.

ARTICLE IV. *Operations*

Section 1. *Methods of making or facilitating loans*

(*a*) The Bank may make or facilitate loans which satisfy the general conditions of Article III in any of the following ways:

(i) By making or participating in direct loans out of its own funds corresponding to its unimpaired paid-up capital and surplus and, subject to Section 6 of this Article, to its reserves.

(ii) By making or participating in direct loans out of funds raised in the market of a member, or otherwise borrowed by the Bank.

(iii) By guaranteeing in whole or in part loans made by private investors through the usual investment channels.

(*b*) The Bank may borrow funds under (*a*) (ii) above or guarantee loans under (*a*) (iii) above only with the approval of the member in whose markets the funds are raised and the member in whose currency the loan is denominated, and only if those members agree that the proceeds may be exchanged for the currency of any other member without restriction.

Section 2. *Availability and transferability of currencies*

(*a*) Currencies paid into the Bank under Article II, Section 7 (i), shall be loaned only with the approval in each case of the member whose currency is involved; provided, however, that if necessary, after the Bank's subscribed capital has been entirely called, such currencies shall, without restriction by the members whose currencies are offered, be used or exchanged for the currencies required to meet contractual payments of interest, other charges or amortization on the Bank's own borrowings, or to meet the Bank's liabilities with respect to such contractual payments on loans guaranteed by the Bank.

(*b*) Currencies received by the Bank from borrowers or guarantors in payment on account of principal of direct loans made with currencies referred to in (*a*) above shall be exchanged for the currencies of other members or reloaned only with the approval in each case of the members whose currencies are involved; provided, however, that if necessary, after the Bank's subscribed capital has been entirely called, such currencies shall, without restriction by the members whose currencies are offered, be used or exchanged for the currencies required to meet contractual payments of interest, other charges or amortization on the Bank's own borrowings, or to meet the Bank's liabilities with respect to such contractual payments on loans guaranteed by the Bank.

(*c*) Currencies received by the Bank from borrowers or guarantors in payment on account of principal of direct loans made by the Bank under Section 1 (*a*) (ii) of this

Article, shall be held and used without restriction by the members to make amortization payments, or to anticipate payment of or repurchase part or all of the Bank's own obligations.

(*d*) All other currencies available to the Bank, including those raised in the market or otherwise borrowed under Section 1 (*a*) (ii) of this Article, those obtained by the sale of gold, those received as payments of interest and other charges for direct loans made under Sections 1 (*a*) (i) and (ii), and those received as payments of commissions and other charges under Section 1 (*a*) (iii), shall be used or exchanged for other currencies or gold required in the operations of the Bank without restriction by the members whose currencies are offered.

(*e*) Currencies raised in the markets of members by borrowers on loans guaranteed by the Bank under Section 1 (*a*) (iii) of this Article, shall also be used or exchanged for other currencies without restriction by such members.

Section 3. *Provision of currencies for direct loans*

The following provisions shall apply to direct loans under Sections 1 (*a*) (i) and (ii) of this Article:

(*a*) The Bank shall furnish the borrower with such currencies of members other than the member in whose territories the project is located as are needed by the borrower for expenditures to be made in the territories of such other members to carry out the purposes of the loan.

(*b*) The Bank may, in exceptional circumstances when local currency required for the purpose of the loan cannot be raised by the borrower on reasonable terms, provide the borrower as part of the loan with an appropriate amount of that currency.

(*c*) The Bank, if the project gives rise indirectly to an increased need for foreign exchange by the member in whose territories the project is located, may in exceptional circumstances provide the borrower as part of the loan with an appropriate amount of gold or foreign exchange not in excess of the borrower's local expenditure in connection with the purposes of the loan.

(*d*) The Bank may, in exceptional circumstances, at the request of a member in whose territories a portion of the loan is spent, repurchase with gold or foreign exchange a part of that member's currency thus spent but in no case shall the part so repurchased exceed the amount by which the expenditure of the loan in those territories gives rise to an increased need for foreign exchange.

Section 4. *Payment provisions for direct loans*

Loan contracts under Section 1 (*a*) (i) or (ii) of this Article shall be made in accordance with the following payment provisions:

(*a*) The terms and conditions of interest and amortization payments, maturity and dates of payment of each loan shall be determined by the Bank. The Bank shall also determine the rate and any other terms and conditions of commission to be charged in connection with such loan.

In the case of loans made under Section 1 (*a*) (ii) of this Article during the first ten years of the Bank's operations, this rate of commission shall be not less than one per cent. per annum and not greater than one and one-half per cent. per annum, and shall be charged on the outstanding portion of any such loan. At the end of this period of ten years, the rate of commission may be reduced by the Bank with respect both to the outstanding portions of loans already made and to future loans, if the reserves accumulated by the Bank under Section 6 of this Article and out of other earnings are considered by it sufficient to justify a reduction. In the case of future loans the Bank shall also have discretion to increase the rate of commission beyond the above limit, if experience indicates that an increase is advisable.

(*b*) All loan contracts shall stipulate the currency or currencies in which payments under the contract shall be made to the Bank. At the option of the borrower, however, such payments may be made in gold, or subject to the agreement of the Bank, in the currency of a member other than that prescribed in the contract.

(i) In the case of loans made under Section 1 (*a*) (i) of this Article, the loan contracts shall provide that payments to the Bank of interest, other charges and amortization shall be made in the currency loaned, unless the member whose currency is loaned agrees that such payments shall be made in some other specified currency or currencies. These payments, subject to the provisions of Article II, Section 9 (*c*), shall be equivalent to the value of such contractual payments at the time the loans were made, in terms of a currency specified for the purpose by the Bank by a three-fourths majority of the total voting power.

(ii) In the case of loans made under Section 1 (*a*) (ii) of this Article, the total amount outstanding and payable to the Bank in any one currency shall at no time exceed the total amount of the outstanding borrowings made by the Bank under Section 1 (*a*) (ii) and payable in the same currency.

(*c*) If a member suffers from an acute exchange stringency, so that the service of any loan contracted by that member or guaranteed by it or by one of its agencies cannot be provided in the stipulated manner, the member concerned may apply to the Bank for a relaxation of the conditions of payment. If the Bank is satisfied that some relaxation is in the interests of the particular member and of the operations of the Bank and of its members as a whole, it may take action under either, or both, of the following paragraphs with respect to the whole, or part, of the annual service:

(i) The Bank may, in its discretion, make arrangements with the member concerned to accept service payments on the loan in the member's currency for periods not to exceed three years upon appropriate terms regarding the use of such currency and the maintenance of its foreign exchange value; and for the repurchase of such currency on appropriate terms.

(ii) The Bank may modify the terms of amortization or extend the life of the loan, or both.

Section 5. *Guarantees*

(*a*) In guaranteeing a loan placed through the usual investment channels, the Bank shall charge a guarantee commission payable periodically on the amount of the loan outstanding at a rate determined by the Bank. During the first ten years of the Bank's operations, this rate shall be not less than one per cent. per annum and not greater than one and one-half per cent. per annum. At the end of this period of ten years, the rate of commission may be reduced by the Bank with respect both to the outstanding portions of loans already guaranteed and to future loans if the reserves accumulated by the Bank under Section 6 of this Article and out of other earnings are considered by it sufficient to justify a reduction. In the case of future loans the Bank shall also have discretion to increase the rate of commission beyond the above limit, if experience indicates that an increase is advisable.

(*b*) Guarantee commissions shall be paid directly to the Bank by the borrower.

(*c*) Guarantees by the Bank shall provide that the Bank may terminate its liability with respect to interest if, upon default by the borrower and by the guarantor, if any, the Bank offers to purchase, at par and interest accrued to a date designated in the offer, the bonds or other obligations guaranteed.

(*d*) The Bank shall have power to determine any other terms and conditions of the guarantee.

Section 6. *Special reserve*

The amount of commissions received by the Bank under Sections 4 and 5 of this Article shall be set aside as a special reserve, which shall be kept available for meeting liabilities of the Bank in accordance with Section 7 of this Article. The special reserve shall be held in such liquid form, permitted under this Agreement, as the Executive Directors may decide.

Section 7. *Methods of meeting liabilities of the Bank in case of defaults*

In cases of default on loans made, participated in, or guaranteed by the Bank:

(*a*) The Bank shall make such arrangements as may be feasible to adjust the obligations under the loans, including arrangements under or analogous to those provided in Section 4 (*c*) of this Article.

(*b*) The payments in discharge of the Bank's liabilities on borrowings or guarantees under Sections 1 (*a*) (ii) and (iii) of this Article shall be charged—

- (i) first, against the special reserve provided in Section 6 of this Article;
- (ii) then, to the extent necessary and at the discretion of the Bank, against the other reserves, surplus and capital available to the Bank.

(*c*) Whenever necessary to meet contractual payments of interest, other charges or amortization on the Bank's own borrowings, or to meet the Bank's liabilities with respect to similar payments on loans guaranteed by it, the Bank may call an appropriate amount of the unpaid subscriptions of members in accordance with Article II, Sections 5 and 7. Moreover, if it believes that a default may be of long duration, the Bank may call an additional amount of such unpaid subscriptions not to exceed in any one year one per cent. of the total subscriptions of the members for the following purposes:

- (i) To redeem prior to maturity or otherwise discharge its liability on all or part of the outstanding principal of any loan guaranteed by it in respect of which the debtor is in default.
- (ii) To repurchase or otherwise discharge its liability on all or part of its own outstanding borrowings.

Section 8. *Miscellaneous operations*

In addition to the operations specified elsewhere in this Agreement, the Bank shall have the power—

- (i) To buy and sell securities it has issued and to buy and sell securities which it has guaranteed or in which it has invested, provided that the Bank shall obtain the approval of the member in whose territories the securities are to be bought or sold;
- (ii) To guarantee securities in which it has invested for the purpose of facilitating their sale;
- (iii) To borrow the currency of any member with the approval of that member;
- (iv) To buy and sell such other securities as the Directors by a three-fourths majority of the total voting power may deem proper for the investment of all or part of the special reserve under Section 6 of this Article.

In exercising the powers conferred by this Section, the Bank may deal with any person, partnership, association, corporation or other legal entity in the territories of any member.

Section 9. *Warning to be placed on securities*

Every security guaranteed or issued by the Bank shall bear on its face a conspicuous statement to the effect that it is not an obligation of any government unless expressly stated on the security.

Section 10. *Political activity prohibited*

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

ARTICLE V. *Organisation and Management*

Section 1. *Structure of the Bank*

The Bank shall have a Board of Governors, Executive Directors, a President and such other officers and staff to perform such duties as the Bank may determine.

Section 2. *Board of Governors*

(*a*) All the powers of the Bank shall be vested in the Board of Governors consisting of one governor and one alternate appointed by each member in such manner as it may determine. Each governor and each alternate shall serve for five years, subject to the pleasure of the member appointing him, and may be reappointed. No alternate may vote except in the absence of his principal. The Board shall select one of the governors as Chairman.

(*b*) The Board of Governors may delegate to the Executive Directors authority to exercise any powers of the Board, except the power to—

(i) Admit new members and determine the conditions of their admission;
(ii) Increase or decrease the capital stock;
(iii) Suspend a member;
(iv) Decide appeals from interpretations of this Agreement given by the Executive Directors;
(v) Make arrangements to co-operate with other international organisations (other than informal arrangements of a temporary and administrative character);
(vi) Decide to suspend permanently the operations of the Bank and to distribute its assets;
(vii) Determine the distribution of the net income of the Bank.

(*c*) The Board of Governors shall hold an annual meeting and such other meetings as may be provided for by the Board or called by the Executive Directors. Meetings of the Board shall be called by the Directors whenever requested by five members or by members having one-quarter of the total voting power.

(*d*) A quorum for any meeting of the Board of Governors shall be a majority of the Governors, exercising not less than two-thirds of the total voting power.

(*e*) The Board of Governors may by regulation establish a procedure whereby the Executive Directors, when they deem such action to be in the best interests of the Bank, may obtain a vote of the Governors on a specific question without calling a meeting of the Board.

(*f*) The Board of Governors, and the Executive Directors to the extent authorised, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.

(*g*) Governors and alternates shall serve as such without compensation from the Bank, but the Bank shall pay them reasonable expenses incurred in attending meetings.

(*h*) The Board of Governors shall determine the remuneration to be paid to the Executive Directors and the salary and terms of the contract of service of the President.

Section 3. *Voting*

(*a*) Each member shall have two hundred and fifty votes plus one additional vote for each share of stock held.

(*b*) Except as otherwise specifically provided, all matters before the Bank shall be decided by a majority of the votes cast.

Section 4. *Executive Directors*

(*a*) The Executive Directors shall be responsible for the conduct of the general operations of the Bank, and for this purpose shall exercise all the powers delegated to them by the Board of Governors.

(*b*) There shall be twelve Executive Directors, who need not be governors, and of whom—

(i) five shall be appointed, one by each of the five members having the largest number of shares;

(ii) seven shall be elected according to Schedule B by all the Governors other than those appointed by the five members referred to in (i) above.

For the purpose of this paragraph, 'members' means governments of countries whose names are set forth in Schedule A, whether they are original members or become members in accordance with Article II, Section 1 (*b*). When governments of other countries become members, the Board of Governors may, by a four-fifths majority of the total voting power, increase the total number of Directors by increasing the number of Directors to be elected.

Executive Directors shall be appointed or elected every two years.

(*c*) Each Executive Director shall appoint an alternate with full power to act for him when he is not present. When the Executive Directors appointing them are present, alternates may participate in meetings but shall not vote.

(*d*) Directors shall continue in office until their successors are appointed or elected. If the office of an elected director becomes vacant more than ninety days before the end of his term, another director shall be elected for the remainder of the term by the Governors who elected the former director. A majority of the votes cast shall be required for election. While the office remains vacant, the alternate of the former director shall exercise his powers, except that of appointing an alternate.

(*e*) The Executive Directors shall function in continuous session at the principal office of the Bank and shall meet as often as the business of the Bank may require.

(*f*) A quorum for any meeting of the Executive Directors shall be a majority of the Directors, exercising not less than one-half of the total voting power.

(*g*) Each appointed Director shall be entitled to cast the number of votes allotted under Section 3 of this Article to the member appointing him. Each elected Director shall be entitled to cast the number of votes which counted toward his election. All the votes which a Director is entitled to cast shall be cast as a unit.

(*h*) The Board of Governors shall adopt regulations under which a member not entitled to appoint a Director under (*b*) above may send a representative to attend any meeting of the Executive Directors when a request made by, or a matter particularly affecting, that member is under consideration.

(*i*) The Executive Directors may appoint such committees as they deem advisable. Membership of such committees need not be limited to Governors or Directors or their alternates.

Section 5. *President and Staff*

(*a*) The Executive Directors shall select a President who shall not be a Governor or an Executive Director or an alternate for either. The President shall be Chairman of the Executive Directors, but shall have no vote except a deciding vote in case of an equal division. He may participate in meetings of the Board of Governors, but shall not vote at such meetings. The President shall cease to hold office when the Executive Directors so decide.

(*b*) The President shall be chief of the operating staff of the Bank and shall conduct, under the direction of the Executive Directors, the ordinary business of the Bank. Subject to the general control of the Executive Directors, he shall be responsible for the organisation, appointment and dismissal of the officers and staff.

(*c*) The President, officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

(*d*) In appointing the officers and staff the President shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

Section 6. *Advisory Council*

(*a*) There shall be an Advisory Council of not less than seven persons selected by the Board of Governors including representatives of banking, commercial, industrial, labour, and agricultural interests, and with as wide a national representation as possible. In those fields where specialised international organisations exist, the members of the Council representative of those fields shall be selected in agreement with such organisations. The Council shall advise the Bank on matters of general policy. The Council shall meet annually and on such other occasions as the Bank may request.

(*b*) Councillors shall serve for two years and may be reappointed. They shall be paid their reasonable expenses incurred on behalf of the Bank.

Section 7. *Loan Committees*

The committees required to report on loans under Article III, Section 4, shall be appointed by the Bank. Each such committee shall include an expert selected by the Governor representing the member in whose territories the project is located and one or more members of the technical staff of the Bank.

Section 8. *Relationship to other international organisations*

(*a*) The Bank, within the terms of this Agreement, shall co-operate with any general international organisation and with public international organisations having specialised responsibilities in related fields. Any arrangements for such co-operation which would involve a modification of any provision of this Agreement may be effected only after amendment to this Agreement under Article VIII.

(*b*) In making decisions on applications for loans or guarantees relating to matters directly within the competence of any international organisation of the types specified in the preceding paragraph and participated in primarily by members of the Bank, the Bank shall give consideration to the views and recommendations of such organisation.

Section 9. *Location of offices*

(*a*) The principal office of the Bank shall be located in the territory of the member holding the greatest number of shares.

(*b*) The Bank may establish agencies or branch offices in the territories of any member of the Bank.

Section 10. *Regional offices and councils*

(*a*) The Bank may establish regional offices and determine the location of, and the areas to be covered by, each regional office.

(*b*) Each regional office shall be advised by a regional council representative of the entire area and selected in such manner as the Bank may decide.

Section 11. *Depositories*

(*a*) Each member shall designate its central bank as a depository for all the Bank's holdings of its currency or, if it has no central bank, it shall designate such other institution as may be acceptable to the Bank.

(*b*) The Bank may hold other assets, including gold, in depositories designated by the five members having the largest number of shares and in such other designated depositories as the Bank may select. Initially, at least one-half of the gold holdings of the Bank shall be held in the depository designated by the member in whose territory the Bank has its principal office, and at least forty per cent. shall be held in the depositories designated by the remaining four members referred to above, each of such depositories to hold, initially, not less than the amount of gold paid on the shares of the member designating it. However, all transfers of gold by the Bank shall be made with due regard to the costs of transport and anticipated requirements of the Bank. In an emergency the Executive Directors may transfer all or any part of the Bank's gold holdings to any place where they can be adequately protected.

Section 12. *Form of holdings of currency*

The Bank shall accept from any member, in place of any part of the member's currency, paid in to the Bank under Article II, Section 7 (i), or to meet amortization payments on loans made with such currency, and not needed by the Bank in its operations, notes or similar obligations issued by the Government of the member or the depository designated by such member, which shall be non-negotiable, non-interest-bearing and payable at their par value on demand by credit to the account of the Bank in the designated depository.

Section 13. *Publication of reports and provision of information*

(*a*) The Bank shall publish an annual report containing an audited statement of its accounts and shall circulate to members at intervals of three months or less a summary statement of its financial position and a profit and loss statement showing the results of its operations.

(*b*) The Bank may publish such other reports as it deems desirable to carry out its purposes.

(*c*) Copies of all reports, statements and publications made under this section shall be distributed to members.

Section 14. *Allocation of net income*

(*a*) The Board of Governors shall determine annually what part of the Bank's net income, after making provision for reserves, shall be allocated to surplus and what part, if any, shall be distributed.

(*b*) If any part is distributed, up to two per cent. non-cumulative shall be paid, as a first charge against the distribution for any year, to each member on the basis of the average amount of the loans outstanding during the year made under Article IV, Section 1 (*a*) (i), out of currency corresponding to its subscriptions. If two per cent. is paid as a first charge, any balance remaining to be distributed shall be paid to all members in proportion to their shares. Payments to each member shall be made in its own currency, or if that currency is not available in other currency acceptable to the member. If such payments are made in currencies other than the member's own currency, the transfer of the currency and its use by the receiving member after payment shall be without restriction by the members.

ARTICLE VI. *Withdrawal and Suspension of Membership: Suspension of Operations*

Section 1. *Right of members to withdraw*

Any member may withdraw from the Bank at any time by transmitting a notice in writing to the Bank at its principal office. Withdrawal shall become effective on the date such notice is received.

Section 2. *Suspension of membership*

If a member fails to fulfil any of its obligations to the Bank, the Bank may suspend its membership by decision of a majority of the Governors, exercising a majority of the total voting power. The member so suspended shall automatically cease to be a member one year from the date of its suspension unless a decision is taken by the same majority to restore the member to good standing.

While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of withdrawal, but shall remain subject to all obligations.

Section 3. *Cessation of membership in International Monetary Fund*

Any member which ceases to be a member of the International Monetary Fund shall automatically cease after three months to be a member of the Bank unless the Bank by three-fourths of the total voting power has agreed to allow it to remain a member.

Section 4. *Settlement of accounts with governments ceasing to be members*

(*a*) When a government ceases to be a member, it shall remain liable for its direct obligations to the Bank and for its contingent liabilities to the Bank so long as any part of the loans or guarantees contracted before it ceased to be a member are outstanding; but it shall cease to incur liabilities with respect to loans and guarantees entered into thereafter by the Bank and to share either in the income or the expenses of the Bank.

(*b*) At the time a government ceases to be a member, the Bank shall arrange for the repurchase of its shares as a part of the settlement of accounts with such government in accordance with the provisions of (*c*) and (*d*) below. For this purpose the repurchase price of the shares shall be the value shown by the books of the Bank on the day the government ceases to be a member.

(*c*) The payment for shares repurchased by the Bank under this section shall be governed by the following conditions:

(i) Any amount due to the government for its shares shall be withheld so long as the government, its central bank or any of its agencies remains liable, as borrower or guarantor, to the Bank and such amount may, at the option of the Bank, be applied on any such liability as it matures. No amount shall be withheld on account of the liability of the government resulting from its subscription for shares under Article II, Section 5 (ii). In any event, no amount due to a member for its shares shall be paid until six months after the date upon which the government ceases to be a member.

(ii) Payments for shares may be made from time to time, upon their surrender by the government, to the extent by which the amount due as the repurchase price in (*b*) above exceeds the aggregate of liabilities on loans and guarantees in (*c*) (i) above until the former member has received the full repurchase price.

(iii) Payments shall be made in the currency of the country receiving payment or at the option of the Bank in gold.

(iv) If losses are sustained by the Bank on any guarantees, participations in loans, or loans which were outstanding on the date when the government ceased to be a member, and the amount of such losses exceeds the amount of the reserve provided against losses on the date when the government ceased to be a member, such government shall be obligated to repay upon demand the amount by which the repurchase price of its shares would have been reduced, if the losses had been taken into account when the repurchase price was determined. In addition, the former member government shall remain liable on any call for unpaid subscriptions under Article II, Section 5 (ii) to the extent that it would have been required to respond if the impairment of capital had occurred and the call had been made at the time the repurchase price of its shares was determined.

(*d*) If the Bank suspends permanently its operations under Section 5 (*b*) of this Article, within six months of the date upon which any government ceases to be a member, all rights of such government shall be determined by the provisions of Section 5 of this Article.

Section 5. *Suspension of operations and settlement of obligations*

(*a*) In an emergency the Executive Directors may suspend temporarily operations in respect of new loans and guarantees pending an opportunity for further consideration and action by the Board of Governors.

(*b*) The Bank may suspend permanently its operations in respect of new loans and guarantees by vote of a majority of the Governors, exercising a majority of the total voting power. After such suspension of operations the Bank shall forthwith cease all activities, except those incident to the orderly realisation, conservation, and preservation of its assets and settlement of its obligations.

(*c*) The liability of all members for uncalled subscriptions to the capital stock of the Bank and in respect of the depreciation of their own currencies shall continue until all claims of creditors, including all contingent claims, shall have been discharged.

(*d*) All creditors holding direct claims shall be paid out of the assets of the Bank, and then out of payments to the Bank on calls on unpaid subscriptions. Before making any payments to creditors holding direct claims, the Executive Directors shall make such arrangements as are necessary, in their judgment, to insure a distribution to holders of contingent claims ratably with creditors holding direct claims.

(*e*) No distribution shall be made to members on account of their subscriptions to the capital stock of the Bank until—

(i) all liabilities to creditors have been discharged or provided for, and

(ii) a majority of the Governors, exercising a majority of the total voting power, have decided to make a distribution.

(*f*) After a decision to make a distribution has been taken under (*e*) above, the Executive Directors may by a two-thirds majority vote make successive distributions of the assets of the Bank to members until all of the assets have been distributed. This distribution shall be subject to the prior settlement of all outstanding claims of the Bank against each member.

(*g*) Before any distribution of assets is made, the Executive Directors shall fix the proportionate share of each member according to the ratio of its shareholding to the total outstanding shares of the Bank.

(*h*) The Executive Directors shall value the assets to be distributed as at the date of distribution and then proceed to distribute in the following manner:

(i) There shall be paid to each member in its own obligations or those of its official agencies or legal entities within its territories, in so far as they are available for distribution, an amount equivalent in value to its proportionate share of the total amount to be distributed.

(ii) Any balance due to a member after payment has been made under (i) above shall be paid, in its own currency, in so far as it is held by the Bank, up to an amount equivalent in value to such balance.

(iii) Any balance due to a member after payment has been made under (i) and (ii) above shall be paid, in gold or currency acceptable to the member, in so far as they are held by the Bank, up to an amount equivalent in value to such balance.

(iv) Any remaining assets held by the Bank after payments have been made to members under (i), (ii), and (iii) above shall be distributed *pro rata* among the members.

(*i*) Any member receiving assets distributed by the Bank in accordance with (*h*) above, shall enjoy the same rights with respect to such assets as the Bank enjoyed prior to their distribution.

ARTICLE VII. *Status, Immunities and Privileges*

Section 1. *Purposes of Article*

To enable the Bank to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territories of each member.

Section 2. *Status of the Bank*

The Bank shall possess full juridical personality, and, in particular, the capacity—

(i) to contract;

(ii) to acquire and dispose of immovable and movable property;

(iii) to institute legal proceedings.

Section 3. *Position of the Bank with regard to judicial process*

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

Section 4. *Immunity of assets from seizure*

Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.

Section 5. *Immunity of archives*

The archives of the Bank shall be inviolable.

Section 6. *Freedom of assets from restrictions*

To the extent necessary to carry out the operations provided for in this Agreement and subject to the provisions of this Agreement, all property and assets of the Bank shall be free from restrictions, regulations, controls and moratoria of any nature.

Section 7. *Privilege for communications*

The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

Section 8. *Immunities and privileges of officers and employees*

All governors, executive directors, alternates, officers and employees of the Bank—

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity;

(ii) not being local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;

(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

Section 9. *Immunities from taxation*

(*a*) The Bank, its assets, property, income and its operations and transactions authorised by this Agreement, shall be immune from all taxation and from all customs duties. The Bank shall also be immune from liability for the collection or payment of any tax or duty.

(*b*) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals.

(*c*) No taxation of any kind shall be levied on any obligation or security issued by the Bank (including any dividend or interest thereon) by whomsoever held—

(i) which discriminates against such obligation or security solely because it is issued by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Bank.

(*d*) No taxation of any kind shall be levied on any obligation or security guaranteed by the Bank (including any dividend or interest thereon) by whomsoever held—

(i) which discriminates against such obligation or security solely because it is guaranteed by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Bank.

Section 10. *Application of Article*

Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Bank of the detailed action which it has taken.

ARTICLE VIII. *Amendments*

(*a*) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a Governor or the Executive Directors, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before the Board. If the proposed amendment is approved by the Board the Bank shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having four-fifths of the total voting power, have accepted the proposed amendment, the Bank shall certify the fact by a formal communication addressed to all members.

(*b*) Notwithstanding (*a*) above, acceptance by all members is required in the case of any amendment modifying (i) the right to withdraw from the Bank provided in Article VI, Section 1; (ii) the right secured by Article II, Section 3 (*c*); (iii) the limitation on liability provided in Article II, Section 6.

(*c*) Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram.

ARTICLE IX. *Interpretation*

(*a*) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article V, Section 4 (*h*).

(*b*) In any case where the Executive Directors have given a decision under (*a*) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board, the Bank may so far as it deems necessary, act on the basis of the decision of the Executive Directors.

(*c*) Whenever a disagreement arises between the Bank and a country which has ceased to be a member, or between the Bank and any member during the permanent suspension of the Bank, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Bank, another by the country involved and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the Permanent Court of International Justice or such other authority as may have been prescribed by the regulation adopted by the Bank. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

ARTICLE X. *Approval Deemed Given*

Whenever the approval of any member is required before any act may be done by the Bank, except in Article VIII, approval shall be deemed to have been given unless the member presents an objection within such reasonable period as the Bank may fix in notifying the member of the proposed act.

ARTICLE XI. *Final Provisions*

Section 1. *Entry into force*

This Agreement shall enter into force when it has been signed on behalf of governments whose minimum subscriptions comprise not less than 65 per cent. of the total subscriptions set forth in Schedule A and when the instruments referred to in Section

2 (*a*) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before the 1st May, 1945.

Section 2. *Signature*

(*a*) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement.

(*b*) Each government shall become a member of the Bank as from the date of the deposit on its behalf of the instrument referred to in (*a*) above, except that no government shall become a member before this Agreement enters into force under Section 1 of this Article.

(*c*) The Government of the United States of America shall inform the governments of all countries whose names are set forth in Schedule A, and all governments whose membership is approved in accordance with Article II, Section 1 (*b*), of all signatures of this Agreement and of the deposit of all instruments referred to in (*a*) above.

(*d*) At the time this Agreement is signed on its behalf, each government shall transmit to the Government of the United States of America one one-hundredth of one per cent. of the price of each share in gold or United States dollars for the purpose of meeting administrative expenses of the Bank. This payment shall be credited on account of the payment to be made in accordance with Article II, Section 8 (*a*). The Government of the United States of America shall hold such funds in a special deposit account and shall transmit them to the Board of Governors of the Bank when the initial meeting has been called under Section 3 of this Article. If this Agreement has not come into force by the 31st December, 1945, the Government of the United States of America shall return such funds to the governments that transmitted them.

(*e*) This Agreement shall remain open for signature at Washington on behalf of the governments of the countries whose names are set forth in Schedule A until the 31st December, 1945.

(*f*) After the 31st December, 1945, this Agreement shall be open for signature on behalf of the government of any country whose membership has been approved in accordance with Article II, Section 1 (*b*).

(*g*) By their signature of this Agreement, all governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under their protection, suzerainty, or authority and all territories in respect of which they exercise a mandate.

(*h*) In the case of governments whose metropolitan territories have been under enemy occupation, the deposit of the instrument referred to in (*a*) above may be delayed until one hundred and eighty days after the date on which these territories have been liberated. If, however, it is not deposited by any such government before the expiration of this period, the signature affixed on behalf of that government shall become void and the portion of its subscription paid under (*d*) above shall be returned to it.

(*i*) Paragraphs (*d*) and (*h*) shall come into force with regard to each signatory government as from the date of its signature.

Section 3. *Inauguration of the Bank*

(*a*) As soon as this Agreement enters into force under Section 1 of this Article, each member shall appoint a governor and the member to whom the largest number of shares is allocated in Schedule A shall call the first meeting of the Board of Governors.

(*b*) At the first meeting of the Board of Governors, arrangements shall be made for the selection of provisional Executive Directors. The governments of the five countries, to which the largest number of shares are allocated in Schedule A, shall appoint provisional Executive Directors. If one or more of such governments have not become members, the executive directorships which they would be entitled to fill shall remain vacant until they become members, or until the 1st January, 1946, whichever is the earlier. Seven provisional Executive Directors shall be elected in accordance with the provisions of Schedule B and shall remain in office until the date of the first regular election of Executive Directors which shall be held as soon as practicable after the 1st January, 1946.

(*c*) The Board of Governors may delegate to the provisional Executive Directors any powers except those which may not be delegated to the Executive Directors.

(*d*) The Bank shall notify members when it is ready to commence operations.

SCHEDULE A

SUBSCRIPTIONS

	(*Millions of dollars*)
Australia	200
Belgium	225
Bolivia	7
Brazil	105
Canada	325
Chile	35
China	600
Colombia	35
Costa Rica	2
Cuba	35
Czechoslovakia	125
Denmark[1]	..
Dominican Republic	2
Ecuador	3·2
Egypt	40
El Salvador	1
Ethiopia	3
France	450
Greece	25
Guatemala	2
Haiti	2
Honduras	1
Iceland	1
India	400
Iran	24
Iraq	6
Liberia	·5
Luxembourg	10
Mexico	65
Netherlands	275
New Zealand	50
Nicaragua	·8
Norway	50
Panama	·2
Paraguay	·8
Peru	17·5
Philippine Commonwealth	15
Poland	125
Union of South Africa	100
Union of Soviet Socialist Republics	1,200
United Kingdom	1,300
United States	3,175
Uruguay	10·5
Venezuela	10·5
Yugoslavia	40
Total	9,100

SCHEDULE B

ELECTION OF EXECUTIVE DIRECTORS

1. The election of the elective Executive Directors shall be by ballot of the Governors eligible to vote under Article V, Section 4 (*b*).

2. In balloting for the elective Executive Directors, each Governor eligible to vote shall cast for one person all of the votes to which the member appointing him is entitled under Section 3 of Article V. The seven persons receiving the greatest number of votes shall be Executive Directors, except that no person who receives less than fourteen per cent. of the total of the votes which can be cast (eligible votes) shall be considered elected.

3. When seven persons are not elected on the first ballot, a second ballot shall be held in which the person who received the lowest number of votes shall be ineligible for election and in which there shall vote only (*a*) those Governors who voted in the first ballot for a person not elected, and (*b*) those Governors whose votes for a person elected are

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[1] The subscription of Denmark shall be determined by the Bank after Denmark accepts membership in accordance with these Articles of Agreement.

deemed under 4 below to have raised the votes cast for that person above fifteen per cent. of the eligible votes.

4. In determining whether the votes cast by a Governor are to be deemed to have raised the total of any person above fifteen per cent. of the eligible votes, the fifteen per cent. shall be deemed to include, first, the votes of the Governor casting the largest number of votes for such person, then the votes of the Governor casting the next largest number, and so on until fifteen per cent. is reached.

5. Any Governor, part of whose votes must be counted in order to raise the total of any person above fourteen per cent., shall be considered as casting all of his votes for such person even if the total votes for such person thereby exceed fifteen per cent.

6. If, after the second ballot, seven persons have not been elected, further ballots shall be held on the same principles until seven persons have been elected, provided that after six persons are elected, the seventh may be elected by a simple majority of the remaining votes and shall be deemed to have been elected by all such votes.[1]

B. *TEMPORARY ORGANIZATIONS*[2]

The International Refugee Organization (*I.R.O.*)

It was announced in the last volume of the *Year Book* that it was proposed to publish the Constitution of the Intergovernmental Committee for Refugees in this volume.[3] That body was set up as a result of the Conference of thirty-two Governments convened at Evian in July 1938 on the initiation of the late President Roosevelt for the purpose of considering measures for the relief of the numerous refugees from Germany and Austria. The main purpose of the Committee, of which thirty-one Governments became members, was to secure by discussion with the German authorities an orderly system of migration of those compelled to leave their countries of origin or residence.[4] Such discussion was inevitably terminated by the outbreak of the War of 1939–45. Nevertheless, considerable progress was made by governmental and voluntary organizations in the parallel task of finding new homes for the migrants. The events of the war, however, immensely increased the dimensions of the refugee problem. An Anglo-American Conference, held at Bermuda in April 1943, in consequence recommended the extension of the mandate of the Intergovernmental Committee and the reorganization of the Committee itself, within which only twenty-eight Governments then remained. Invitations were accordingly issued to twenty-one further Governments to join the Committee, and the drafting of a Constitution for that body, which had in its earlier years been an informal one, was undertaken. The Fourth Plenary Session of the Committee, held in August 1944, adopted the resulting 'Rules for the Constitution and Procedure' and a set of Financial Regulations.[5]

The Intergovernmental Committee was not, of course, the first essay in international assistance to refugees. The work of the League of Nations in the same field was extensive and is well known.[6] The setting up of the Intergovernmental Committee was indeed a temporary expedient undertaken principally owing to the decline in influence and authority of the League. Now that the United Nations has replaced the League, logic would demand the winding-up of the Committee and the transfer of its functions to an organ of the former body. Already at its First Session the General Assembly recognized the urgency of the refugee problem and on 12 February 1946 recommended that the Economic and Social Council should establish a special committee to examine it.[1] This Committee, which met in London from April to June 1946, reported in favour of the establishment of a new temporary international organization to deal with refugees and displaced persons. The Economic and Social Council and the General Assembly having accepted this suggestion, and having adopted a draft Constitution for the proposed International Refugee Organization, which will supersede the Intergovernmental Committee, it is appropriate to print in this section of the *Year Book* the former instrument instead of the Constitution of the Committee, as was originally intended. The Constitution of the I.R.O. will come into force only upon ratification by at least fifteen states whose required contributions to the operational budget of approximately one hundred and fifty million U.S. dollars amount to not less than 75 per cent. of the total.[2] But there is annexed to the Constitution an Agreement on Interim Measures providing for the setting up of a Preparatory Commission for I.R.O., which in fact came into being on 31 December 1946, and which has, as from 1 July 1947, assumed the responsibilities of U.N.R.R.A. and of the Intergovernmental Committee in regard to refugees.[3]

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[1] Text taken from *Treaty Series*, No. 21 (1946), Cmd. 6885.

[2] For an explanation of the method of arrangement of this section of the *Year Book* see vol. 23 (1946), pp. 432–3.

[3] Vol. 23 (1946), p. 496.

[4] For the early history of the body see *Report of the Director to the Fourth Plenary Session*, London, July 1944, and Jennings in this *Year Book*, 20 (1939), p. 98.

[5] See *Report of the Director to the Fifth Plenary Session*, London, September 1945. The 'Rules' referred to are published without any imprint.

[6] Compare Eagleton, *International Government* (1932), pp. 437–8.

The I.R.O. is declared by its Constitution to be a 'non-permanent' organization and a specialized agency to be brought into relationship with the United Nations.[4] Its functions, which are to be carried out 'in accordance with the purposes and principles of the Charter of the United Nations', are the repatriation, identification, care and assistance, legal and political protection, and the resettlement of a defined class of refugees (Art. 2 (1)). The class for which it is to cater consists, broadly, of European refugees and 'displaced persons' whose unhappy state has resulted from the War of 1939–45. But persons who were considered refugees before the outbreak of that war, including, in particular, Jewish refugees from Germany and Austria and political refugees from Spain, are also within the class.[5] It does not, of course, comprehend war criminals, nor yet non-criminal adherents of the late enemy, but it is estimated to contain almost a million persons, mostly within the occupied zones of Germany.[6]

Membership of the I.R.O. is open to all Members of the United Nations and also to 'any other peace-loving States' upon recommendation of the Executive Committee by a two-thirds majority vote of the General Council, subject to the terms of any agreement between the Organization and the United Nations (Art. 4 (1)). Members may withdraw upon the giving of a year's notice (Art. 4 (10)), and may be expelled (Art. 4 (6–8)). The organs of the Organization are a General Council of all the Members, which is the 'ultimate policy-making body' (Art. 6), an Executive Committee of nine Members elected for two-year terms and holding meetings normally twice a month (Art. 7), and a Secretariat, headed by a Director-General (Art. 8). This scheme clearly owes something to the Constitution of U.N.R.R.A., the work of which I.R.O. is, of course, intended to carry on. It is one which involves the delegation to the Director-General of a greater degree of authority than the members of international organizations are commonly prepared to admit, but which the nature of the task to be performed both justifies and necessitates.[7] But the arrangement is without much importance from the point of view of international constitutional law in general, and no general comment upon it is, therefore, offered.

There may be singled out for mention, however, the provision which stipulates that 'some special system of semi-judicial machinery should be created' to ensure the impartial and equitable application of the general principles laid down as governing the definitions of refugees and displaced persons annexed to the Constitution. That provision may well cause to come into being an important body of international and administrative law and practice.

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[1] For text of resolution see *Proceedings of the General Assembly, First Part of First Session* (London, H.M.S.O., 1946), Annex 6.

[2] Art. 18 (2).

[3] See *Year Book of the United Nations*, 1946–7, pp. 806–8.

[4] Preamble.

[5] Annex I.

[6] *Year Book of the United Nations*, 1946–7, p. 808.

[7] Compare, as to the Constitution of U.N.R.R.A., this *Year Book*, 23 (1946), pp. 495–6.

CONSTITUTION OF THE INTERNATIONAL REFUGEE ORGANIZATION

PREAMBLE

The Governments accepting this Constitution,

Recognizing:

that genuine refugees and displaced persons constitute an urgent problem which is international in scope and character;

that as regards displaced persons, the main task to be performed is to encourage and assist in every way possible their early return to their country of origin;

that genuine refugees and displaced persons should be assisted by international action, either to return to their countries of nationality or former habitual residence, or to find new homes elsewhere, under the conditions provided for in this Constitution; or in the case of Spanish Republicans, to establish themselves temporarily in order to enable them to return to Spain when the present Falangist regime is succeeded by a democratic regime;

that re-settlement and re-establishment of refugees and displaced persons be contemplated only in cases indicated clearly in the Constitution;

that genuine refugees and displaced persons, until such time as their repatriation or re-settlement and re-establishment is effectively completed, should be protected in their rights and legitimate interests, should receive care and assistance and, as far as possible, should be put to useful employment in order to avoid the evil and anti-social consequences of continued idleness; and

that the expenses of repatriation to the extent practicable should be charged to Germany and Japan for persons displaced by those Powers from countries occupied by them:

Have agreed:

for the accomplishment of the foregoing purposes in the shortest possible time, to establish and do hereby establish a non-permanent organization to be called the International Refugee Organization, a specialized agency to be brought into relationship with the United Nations, and accordingly

Have accepted the following Articles:

ARTICLE 1. *Mandate*

The mandate of the Organization shall extend to refugees and displaced persons in accordance with the principles, definitions and conditions set forth in Annex I, which is attached to and made an integral part of this Constitution.

ARTICLE 2. *Functions and Powers*

1. The functions of the Organization to be carried out in accordance with the purposes and the principles of the Charter of the United Nations, shall be: the repatriation; the identification, registration and classification; the care and assistance; the legal and political protection; the transport; and the re-settlement and re-establishment, in countries able and willing to receive them, of persons who are the concern of the Organization under the provisions of Annex I. Such functions shall be exercised with a view:

(*a*) to encouraging and assisting in every way possible the early return to their country of nationality, or former habitual residence, of those persons who are the concern of the Organization, having regard to the principles laid down in the resolution on refugees and displaced persons adopted by the General Assembly of the United Nations on 12 February 1946 (Annex III) and to the principles set forth in the Preamble, and to promoting this by all possible means, in particular by providing them with material assistance, adequate food for a period of three months from the time of their departure from their present places of residence provided they are returning to a country suffering as a result of enemy occupation during the war, and provided such food shall be distributed under the auspices of the Organization; and the necessary clothing and means of transportation; and (*b*) with respect to persons for whom repatriation does not take place under paragraph 1 (*a*) of this Article to facilitating:

  (i) their re-establishment in countries of temporary residence;

  (ii) the emigration to, re-settlement and re-establishment in other countries of individuals or family units; and

  (iii) as may be necessary and practicable, within available resources and subject to the relevant financial regulations, the investigation, promotion or execution of projects of group re-settlement or large-scale re-settlement.

(*c*) with respect to Spanish Republicans to assisting them to establish themselves temporarily until the time when a democratic regime in Spain is established.

2. For the purpose of carrying out its functions, the Organization may engage in all appropriate activities, and to this end, shall have power:

(*a*) to receive and disburse private and public funds;

(*b*) as necessary to acquire land and buildings by lease, gift, or in exceptional circumstances only, by purchase; and to hold such land and buildings or to dispose of them by lease, sale or otherwise;

(*c*) to acquire, hold and convey other necessary property;

(*d*) to enter into contracts, and undertake obligations; including contracts with Governments or with occupation or control authorities, whereby such authorities would continue, or undertake, in part or in whole, the care and maintenance of refugees and displaced persons in territories under their authority, under the supervision of the Organization;

(*e*) to conduct negotiations and conclude agreements with Governments;

(*f*) to consult and co-operate with public and private organizations whenever it is deemed advisable, in so far as such organizations share the purpose of the Organization and observe the principles of the United Nations;

(*g*) to promote the conclusion of bilateral arrangements for mutual assistance in the repatriation of displaced persons, having regard to the principles laid down in paragraph (*c*) (ii) of the resolution adopted by the General Assembly of the United Nations on 12 February 1946 regarding the problem of refugees (Annex III);

(*h*) to appoint staff, subject to the provisions of Article 9 of this Constitution;

(*i*) to undertake any project appropriate to the accomplishment of the purposes of this Organization;

(*j*) to conclude agreements with countries able and willing to receive refugees and displaced persons for the purpose of ensuring the protection of their legitimate rights and interests in so far as this may be necessary; and

(*k*) in general, to perform any other legal act appropriate to its purposes.

ARTICLE 3. *Relationship to the United Nations*

The relationship between the Organization and the United Nations shall be established in an agreement between the Organization and the United Nations as provided in Articles 57 and 63 of the Charter of the United Nations.

ARTICLE 4. *Membership*

1. Membership in the Organization is open to Members of the United Nations. Membership is also open to any other peace-loving States, not members of the United Nations, upon recommendation of the Executive Committee, by a two-thirds majority vote of members of the General Council present and voting, subject to the conditions of the agreement between the Organization and the United Nations approved pursuant to Article 3 of this Constitution.

2. Subject to the provisions of paragraph 1 of this article, the members of the Organization shall be those States whose duly authorized representatives sign this Constitution without reservation as to subsequent acceptance, and those States which deposit with the Secretary-General of the United Nations their instruments of acceptance after their duly authorized representatives have signed this Constitution with such reservation.

3. Subject to the provisions of paragraph 1 of this article, those States, whose representatives have not signed the Constitution referred to in the previous paragraph, or which, having signed it, have not deposited the relevant instrument of acceptance within the following six months, may, however, be admitted as members of the Organization in the following cases:

(*a*) if they undertake to liquidate any outstanding contributions in accordance with the relevant scale; or

(*b*) if they submit to the Organization a plan for the admission to their territory, as immigrants, refugees or displaced persons in such numbers, and on such settlement conditions as shall, in the opinion of the Organization, require from the applicant State an expenditure or investment equivalent, or approximately equivalent, to the contribution that they would be called upon, in accordance with the relevant scale, to make to the budget of the Organization.

4. Those States which, on signing the Constitution, express their intention to avail themselves of clause (*b*) of paragraph 3 of this article may submit the plan referred to in that paragraph within the following three months, without prejudice to the presentation within six months of the relevant instrument of acceptance.

5. Members of the Organization which are suspended from the exercise of the rights and privileges of Membership of the United Nations shall, upon request of the latter, be suspended from the rights and privileges of this Organization.

6. Members of the Organization which are expelled from the United Nations shall automatically cease to be members of this Organization.

7. With the approval of the General Assembly of the United Nations, members of the Organization which are not members of the United Nations, and which have persistently violated the principles of the Charter of the United Nations may be suspended from the rights and privileges of the Organization, or expelled from its membership by the General Council.

8. A member of the Organization which has persistently violated the principles contained in the present Constitution, may be suspended from the rights and privileges of the Organization by the General Council, and with the approval of the General Assembly of the United Nations, may be expelled from the Organization.

9. A member of the Organization undertakes to afford its general support to the work of the Organization.

10. Any member may at any time give written notice of withdrawal to the Chairman of the Executive Committee. Such notice shall take effect one year after the date of its receipt by the Chairman of the Executive Committee.

ARTICLE 5. *Organs*

There are established as the principal organs of the Organization: a General Council, an Executive Committee and a Secretariat.

ARTICLE 6. *The General Council*

1. The ultimate policy-making body of the Organization shall be the General Council in which each member shall have one representative and such alternates and advisers as may be necessary. Each member shall have one vote in the General Council.

2. The General Council shall be convened in regular session not less than once a year by the Executive Committee provided, however, that for three years after the Organization comes into being the General Council shall be convened in regular session not less than twice a year. It may be convened in special session whenever the Executive Committee shall deem necessary; and it shall be convened in special session by the Director-General within thirty days after a request for such a special session is received by the Director-General from one-third of the members of the Council.

3. At the opening meeting of each session of the General Council, the Chairman of the Executive Committee shall preside until the General Council has elected one of its members as Chairman for the session.

4. The General Council shall thereupon proceed to elect from among its members a first Vice-Chairman and a second Vice-Chairman, and such other officers as it may deem necessary.

ARTICLE 7. *Executive Committee*

1. The Executive Committee shall perform such functions as may be necessary to give effect to the policies of the General Council, and may make, between sessions of the General Council, policy decisions of an emergency nature which it shall pass on to the Director-General, who shall be guided thereby, and shall report to the Executive Committee on the action which he has taken thereon. These decisions shall be subject to reconsideration by the General Council.

2. The Executive Committee of the General Council shall consist of the representatives of nine members of the Organization. Each member of the Executive Committee shall be elected for a two-year term by the General Council at a regular session of the Council. A member may continue to hold office on the Executive Committee during any such period as may intervene between the conclusion of its term of office and the first succeeding meeting of the General Council at which an election takes place. A member shall be at all times eligible for re-election to the Executive Committee. If a vacancy occurs in the membership of the Executive Committee between two sessions of the General Council, the Executive Committee may fill the vacancy by itself appointing another member to hold office until the next meeting of the Council.

3. The Executive Committee shall elect a Chairman and a Vice-Chairman from among its members, the terms of office to be determined by the General Council.

4. Meetings of the Executive Committee shall be convened:

(*a*) at the call of the Chairman, normally twice a month;

(*b*) whenever any representative of a member of the Executive Committee shall request the convening of a meeting, by a letter addressed to the Director-General, in which case the meeting shall be convened within seven days of the date of the receipt of the request;

(*c*) in the case of a vacancy occurring in the Chairmanship, the Director-General shall convene a meeting at which the first item on the agenda shall be the election of a Chairman.

5. The Executive Committee may, in order to investigate the situation in the field, either as a body or through a delegation of its members, visit camps, hostels or assembly points within the control of the Organization, and may give instructions to the Director-General in consequence of the reports of such visits.

6. The Executive Committee shall receive the reports of the Director-General as provided in paragraph 6 of Article 8 of this Constitution, and, after consideration thereof, shall request the Director-General to transmit these reports to the General Council with such comments as the Executive Committee may consider appropriate. These reports and such comments shall be transmitted to all members of the General Council before its next regular session and shall be published. The Executive Committee may request the Director-General to submit such further reports as may be deemed necessary.

ARTICLE 8. *Administration*

1. The chief administrative officer of the Organization shall be the Director-General. He shall be responsible to the General Council and the Executive Committee and shall carry out the administrative and executive functions of the Organization in accordance with the decisions of the General Council and the Executive Committee, and shall report on the action taken thereon.

2. The Director-General shall be nominated by the Executive Committee and appointed by the General Council. If no person acceptable to the General Council is nominated by the Executive Committee, the General Council may proceed to appoint a person who has not been nominated by the Committee. When a vacancy occurs in the office of the Director-General the Executive Committee may appoint an Acting Director-

General to assume all the duties and functions of the office until a Director-General can be appointed by the General Council.

3. The Director-General shall serve under a contract which shall be signed on behalf of the Organization by the Chairman of the Executive Committee and it shall be a clause of such contract that six months' notice of termination can be given on either side. In exceptional circumstances, the Executive Committee, subject to subsequent confirmation by the General Council, has the power to relieve the Director-General of his duties by a two-thirds majority vote of the members if, in the Committee's opinion, his conduct is such as to warrant such action.

4. The staff of the Organization shall be appointed by the Director-General under regulations to be established by the General Council.

5. The Director-General shall be present, or be represented by one of his subordinate officers, at all meetings of the General Council, or the Executive Committee and of all other committees and sub-committees. He or his representatives may participate in any such meeting but shall have no vote.

6. (*a*) The Director-General shall prepare at the end of each half-year period a report on the work of the Organization. The report prepared at the end of each alternate period of six months shall relate to the work of the Organization during the preceding year and shall give a full account of the activities of the Organization during that period. These reports shall be submitted to the Executive Committee for consideration, and thereafter shall be transmitted to the General Council together with any comments of the Executive Committee thereon, as provided by paragraph 6 of Article 7 of this Constitution.

(*b*) At every special session of the General Council the Director-General shall present a statement of the work of the Organization since the last meeting.

ARTICLE 9. *Staff*

1. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. A further consideration in the employment of the staff shall be adherence to the principles laid down in the present Constitution. Due regard shall be paid to the importance of recruiting staff on an appropriate geographical basis, and of employing an adequate number of persons from the countries of origin of the displaced persons.

2. No person shall be employed by the Organization who is excluded under Part II, other than paragraph 5, of Annex I to this Constitution, from becoming the concern of the Organization.

3. In the performance of their duties, the Director-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization. Each member of the Organization undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities.

ARTICLE 10. *Finance*

1. The Director-General shall submit, through the Executive Committee, to the General Council an annual budget, covering the necessary administrative, operational and large-scale re-settlement expenditures of the Organization, and from time to time such supplementary budgets as may be required. The Executive Committee shall transmit the budget to the General Council with any remarks it may deem appropriate. Upon final approval of a budget by the General Council, the total under each of these three headings—to wit, 'administrative', 'operational' and 'large-scale re-settlement'—shall be allocated to the members in proportions for each heading to be determined from time to time by a two-thirds majority vote of the members of the General Council present and voting.

2. Contributions shall be payable, as a result of negotiations undertaken at the request of members between the Organization and such members, in kind or in such currency as may be provided for in a decision by the General Council, having regard to currencies in which the anticipated expenditure of the Organization will be effected from time to time, regardless of the currency in which the budget is expressed.

3. Each member undertakes to contribute to the Organization its share of the administrative expenses as determined and allocated under paragraphs 1 and 2 of this article.

4. Each member shall contribute to the operational expenditures—except for large-scale re-settlement expenditures—as determined and allocated under paragraphs 1 and 2 of this article, subject to the requirements of the constitutional procedure of such members. The members undertake to contribute to the large-scale re-settlement expenditures on a voluntary basis and subject to the requirements of their constitutional procedure.

5. A member of the Organization, which, after the expiration of a period of three months following the date of the coming into force of this Constitution, has not paid its financial contribution to the Organization for the first financial year, shall have no vote in the General Council or the Executive Committee until such contribution has been paid.

6. Subject to the provisions of paragraph 5 of this article, a member of the Organization which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Council or the Executive Committee if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding one full year.

7. The General Council may, nevertheless, permit such members to vote if it is satisfied that the failure to pay is due to conditions beyond the control of such members.

8. The administrative budget of the Organization shall be submitted annually to the General Assembly of the United Nations for such review and recommendation as the General Assembly may deem appropriate. The agreement under which the Organization shall be brought into relationship with the United Nations under Article 3 of this Constitution may provide, *inter alia*, for the approval of the administrative budget of the Organization by the General Assembly of the United Nations.

9. Without prejudice to the provisions concerning supplementary budgets in paragraph 1 of this article, the following exceptional arrangements shall apply in respect of the financial year in which this Constitution comes into force:

(*a*) the budget shall be the provisional budget set forth in Annex II to this Constitution; and

(*b*) the amounts to be contributed by the members shall be in the proportions set forth in Annex II to this Constitution.

ARTICLE 11. *Headquarters and Other Offices*

1. The Organization shall establish its headquarters at Paris or at Geneva, as the General Council shall decide, and all meetings of the General Council and the Executive Committee shall be held at this headquarters, unless a majority of the members of the General Council or the Executive Committee have agreed, at a previous meeting or by correspondence with the Director-General, to meet elsewhere.

2. The Executive Committee may establish such regional and other offices and representations as may be necessary.

3. All offices and representations shall be established only with the consent of the Government in authority in the place of establishment.

ARTICLE 12. *Procedure*

1. The General Council shall adopt its own rules of procedure, following in general, the rules of procedure of the Economic and Social Council of the United Nations, wherever appropriate, and with such modifications as the General Council shall deem desirable. The Executive Committee shall regulate its own procedure subject to any decisions of the General Council in respect thereto.

2. Unless otherwise provided in the Constitution or by action of the General Council, motions shall be carried by simple majority of the members present and voting in the General Council and the Executive Committee.

ARTICLE 13. *Status, Immunities and Privileges*

1. The Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its objectives.

2. (*a*) The Organization shall enjoy in the territory of each of its members such privileges and immunities as may be necessary for the exercise of its functions and the fulfilment of its objectives.

(*b*) Representatives of members, officials and administrative personnel of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. Such legal status, privileges and immunities shall be defined in an agreement to be prepared by the Organization after consultation with the Secretary-General of the United Nations. The agreement shall be open to accession by all members and shall continue in force as between the Organization and every member which accedes to the agreement.

ARTICLE 14. *Relations with Other Organizations*

1. Subject to the provisions of the agreement to be negotiated with the United Nations, pursuant to Article 3 of this Constitution, the Organization may establish such effective relationships as may be desirable with other international organizations.

2. The Organization may assume all or part of the functions, and acquire all or part of the resources, assets and liabilities of any inter-governmental organization or agency, the purposes and functions of which lie within the scope of the Organization. Such action may be taken either through mutually acceptable arrangements with the competent authorities of such organizations or agencies, or pursuant to authority conferred upon the Organization by international convention or agreement.

ARTICLE 15. *Relationship with Authorities of Countries of Location of Refugees and Displaced Persons*

The relationship of the Organization with the Governments or administrations of countries in which displaced persons or refugees are located, and the conditions under which it will operate in such countries, shall be determined by agreements to be negotiated by it with such Governments or administrations in accordance with the terms of this Constitution.

ARTICLE 16. *Amendment of Constitution*

Texts of proposed amendments to this Constitution shall be communicated by the Director-General to members at least three months in advance of their consideration by the General Council. Amendments shall come into effect when adopted by a two-thirds majority of the members of the General Council present and voting and accepted by two-thirds of the members in accordance with their respective constitutional processes, provided, however, that amendments involving new obligations for members shall come into force in respect of each member only on acceptance by it.

ARTICLE 17. *Interpretation*

1. The Chinese, English, French, Russian and Spanish texts of this Constitution shall be regarded as equally authentic.

2. Subject to Article 96 of the Charter of the United Nations and of Chapter II of the Statute of the International Court of Justice, any question or dispute concerning the interpretation or application of this Constitution shall be referred to the International

Court of Justice, unless the General Council or the parties to such dispute agree to another mode of settlement.

ARTICLE 18. *Entry into Force*

1. (*a*) States may become parties to this Constitution by:

(i) signature without reservation as to approval;
(ii) signature subject to approval followed by acceptance;
(iii) acceptance.

(*b*) Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

2. This Constitution shall come into force when at least fifteen States, whose required contributions to Part I of the operational budget as set forth in Annex II of this Constitution amount to not less than seventy-five per cent. of the total thereof, have become parties to it.

3. In accordance with Article 102 of the Charter of the United Nations, the Secretary-General of the United Nations will register this Constitution, when it has been signed, without reservation as to approval, on behalf of one State or upon deposit of the first instrument of acceptance.

4. The Secretary-General of the United Nations will inform States parties to this Constitution, of the date when it has come into force; he will also inform them of the dates when other States have become parties to this Constitution.

ANNEX I

DEFINITIONS

General Principles

1. The following general principles constitute an integral part of the definitions as laid down in Parts I and II of this Annex.

(*a*) The main object of the Organization will be to bring about a rapid and positive solution of the problem of *bona fide* refugees and displaced persons, which shall be just and equitable to all concerned.

(*b*) The main task concerning displaced persons is to encourage and assist in every way possible their early return to their countries of origin, having regard to the principles laid down in paragraph (*c*) (ii) of the resolution adopted by the General Assembly of the United Nations on 12 February 1946 regarding the problem of refugees (Annex III).[1]

(*c*) As laid down in the resolution adopted by the Economic and Social Council on 16 February 1946,[2] no international assistance should be given to traitors, quislings and war criminals, and nothing should be done to prevent in any way their surrender and punishment.

(*d*) It should be the concern of the Organization to ensure that its assistance is not exploited in order to encourage subversive or hostile activities directed against the Government of any of the United Nations.

(*e*) It should be the concern of the Organization to ensure that its assistance is not exploited by persons in the case of whom it is clear that they are unwilling to return to their countries of origin because they prefer idleness to facing the hardships of helping in the reconstruction of their countries, or by persons who intend to settle in other countries for purely economic reasons, thus qualifying as emigrants.

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[1] Omitted. The paragraph referred to lays down the principle that no refugees or displaced persons who have finally and definitely, in complete freedom and after receiving full knowledge of the facts, expressed valid objections to returning to their countries of origin, shall be compelled so to return. For text see *Proceedings of the General Assembly, First Part of First Session* (London, H.M.S.O., 1946), Annex 6.

[2] See *Economic and Social Council, Official Records, First Year: First Session.*

(*f*) On the other hand it should equally be the concern of the Organization to ensure that no *bona fide* and deserving refugee or displaced person is deprived of such assistance as it may be in a position to offer.

(*g*) The Organization should endeavour to carry out its functions in such a way as to avoid disturbing friendly relations between nations. In the pursuit of this objective, the Organization should exercise special care in cases in which the re-establishment or re-settlement of refugees or displaced persons might be contemplated, either in countries contiguous to their respective countries of origin or in non-self-governing countries. The Organization should give due weight, among other factors, to any evidence of genuine apprehension and concern felt in regard to such plans, in the former case, by the country of origin of the persons involved, or, in the latter case, by the indigenous population of the non-self-governing country in question.

2. To ensure the impartial and equitable application of the above principles and of the terms of the definition which follows, some special system of semi-judicial machinery should be created, with appropriate constitution, procedure and terms of reference.

PART I

REFUGEES AND DISPLACED PERSONS WITHIN THE MEANING OF THE RESOLUTION ADOPTED BY THE ECONOMIC AND SOCIAL COUNCIL OF THE UNITED NATIONS ON 16 FEBRUARY 1946[1]

Section A. *Definition of Refugees*

1. Subject to the provisions of sections C and D and of Part II of this Annex, the term 'refugee' applies to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he has retained his nationality, belongs to one of the following categories:

(*a*) victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;

(*b*) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;

(*c*) persons who were considered 'refugees' before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion.

2. Subject to the provisions of sections C and D and of Part II of this Annex regarding the exclusion of certain categories of persons, including war criminals, quislings and traitors, from the benefits of the Organization, the term 'refugee' also applies to a person, other than a displaced person as defined in Section B of this Annex, who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.

3. Subject to the provisions of section D and of Part II of this Annex, the term 'refugee' also applies to persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly re-settled therein.

4. The term 'refugee' also applies to unaccompanied children who are war orphans or whose parents have disappeared, and who are outside their countries of origin. Such children, 16 years of age or under, shall be given all possible priority assistance, including, normally, assistance in repatriation in the case of those whose nationality can be determined.

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[1] See *Economic and Social Council, Official Records, First Year: First Session.*

Section B. *Definition of Displaced Persons*

The term 'displaced person' applies to a person who, as a result of the actions of the authorities of the regimes mentioned in Part I, section A, paragraph 1 (*a*) of this Annex has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons. Displaced persons will only fall within the mandate of the Organization subject to the provisions of sections C and D of Part I and to the provisions of Part II of this Annex. If the reasons for their displacement have ceased to exist, they should be repatriated as soon as possible in accordance with Article 2, paragraph 1 (*a*) of this Constitution, and subject to the provision of paragraph (*c*), sub-paragraphs (ii) and (iii) of the General Assembly resolution of 12 February 1946 regarding the problem of refugees (Annex III).

Section C. *Conditions under which 'Refugees' and 'Displaced Persons' will become the Concern of the Organization*

1. In the case of all the above categories except those mentioned in section A, paragraphs 1 (*b*) and 3 of this Annex, persons will become the concern of the Organization in the sense of the resolution adopted by the Economic and Social Council on 16 February 1946 if they can be repatriated, and the help of the Organization is required in order to provide for their repatriation, or if they have definitely, in complete freedom and after receiving full knowledge of the facts, including adequate information from the Governments of their countries of nationality or former habitual residence, expressed valid objections to returning to those countries.

(*a*) The following shall be considered as valid objections:

(i) Persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations;

(ii) objections of a political nature judged by the Organization to be 'valid', as contemplated in paragraph 8 (*a*)[1] of the report of the Third Committee of the General Assembly as adopted by the Assembly on 12 February 1946;

(iii) in the case of persons falling within the category mentioned in section A, paragraphs 1 (*a*) and 1 (*c*) compelling family reasons arising out of previous persecution, or, compelling reasons of infirmity or illness.

(*b*) The following shall normally be considered 'adequate information': information regarding conditions in the countries of nationality of the refugees and displaced persons concerned, communicated to them directly by representatives of the Governments of these countries, who shall be given every facility for visiting camps and assembly centres of refugees and displaced persons in order to place such information before them.

2. In the case of all refugees falling within the terms of section A, paragraph 1 (*b*) of this Annex, persons will become the concern of the Organization in the sense of the resolution adopted by the Economic and Social Council of the United Nations on 16 February 1946,[2] so long as the Falangist regime in Spain continues. Should that regime be replaced by a democratic regime they will have to produce valid objections against returning to Spain corresponding to those indicated in paragraph 1 (*a*) of this section.

Section D. *Circumstances in which Refugees and Displaced Persons will cease to be the Concern of the Organization*

Refugees or displaced persons will cease to be the concern of the Organization:

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[1] Paragraph 8 (*a*): 'In answering the representative of Belgium, the Chairman stated that it was implied that the international body would judge what were, or what were not, "valid objections"; and that such objections clearly might be of a political nature.'

[2] See preceding footnote.

(*a*) when they have returned to the countries of their nationality in United Nations territory, unless their former habitual residence to which they wish to return is outside their country of nationality; or

(*b*) when they have acquired a new nationality; or

(*c*) when they have, in the determination of the Organization, become otherwise firmly established; or

(*d*) when they have unreasonably refused to accept the proposals of the Organization for their re-settlement or repatriation; or

(*e*) when they are making no substantial effort towards earning their living when it is possible for them to do so, or when they are exploiting the assistance of the Organization.

PART II

PERSONS WHO WILL NOT BE THE CONCERN OF THE ORGANIZATION

1. War criminals, quislings and traitors.

2. Any other persons who can be shown:

(*a*) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(*b*) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.[1]

3. Ordinary criminals who are extraditable by treaty.

4. Persons of German ethnic origin, whether German nationals or members of German minorities in other countries, who:

(*a*) have been or may be transferred to Germany from other countries;

(*b*) have been, during the second world war, evacuated from Germany to other countries;

(*c*) have fled from, or into, Germany, or from their places of residence into countries other than Germany in order to avoid falling into the hands of Allied armies.

5. Persons who are in receipt of financial support and protection from their country of nationality, unless their country of nationality requests international assistance for them.

6. Persons who, since the end of hostilities in the second world war:

(*a*) have participated in any organization having as one of its purposes the overthrow by armed force of the Government of their country of origin, being a Member of the United Nations; or the overthrow by armed force of the Government of any other Member of the United Nations, or have participated in any terrorist organization;

(*b*) have become leaders of movements hostile to the Government of their country of origin being a Member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin;

(*c*) at the time of application for assistance, are in the military or civil service of a foreign State.

ANNEX II (BUDGET AND CONTRIBUTIONS FOR THE FIRST FINANCIAL YEAR) and ANNEX III (RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY ON 12 FEBRUARY 1946) omitted.

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[1] Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute 'voluntary assistance'. Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld from them.

REVIEWS OF BOOKS

Académie de Droit international de La Haye. Recueil des Cours, vol. 67 (1939) (I). Paris: Recueil Sirey. 1947. 643 pp.

This volume contains the text of six courses of lectures delivered before the Academy of International Law.

M. René Dollot, a distinguished member of the French diplomatic service, speaks with authority in his course on *La Neutralité permanente*. He first discusses the general concept of neutrality, its relation to sovereignty and independence, and the influence of geographical and political factors: 'Les neutralités permanentes qui résultent d'une heureuse combinaison de la géographie et de l'histoire sont des neutralités naturelles; celles que l'on a prétendu établir sans tenir compte de ces deux facteurs ne sont que des neutralités artificielles.' Next he examines in detail the history of Swiss, Belgian, and Scandinavian neutrality, the examples of local neutralized territories, and the neutralization of insular as opposed to continental territories. His conclusions, in which he conceives the neutralized territories and states as essential parts of a system of equilibrium, need drastic revision in the light of events since 1939. When these lectures were delivered, the failure of the League of Nations was already apparent and there appeared to be a return to the old system of balance of power in which the neutralization of key territories had always played an important role. It was not seen that this system was as friable as the system of collective security itself and was to succumb in the same cataclysm of the Second World War. Nevertheless, although the lecturer's conclusions are already outmoded, his presentation of the material, especially the historical part, is of permanent value.

M. Ruyssen, a philosopher who later turned his attention to international law and became one of the most ardent propagandists of the League of Nations, writes on *Les Caractères sociologiques de la communauté humaine*. This is a jurisprudential investigation of the extent to which the human community constitutes a society in the proper sense of the word. This is really the question of the possibility of the survival of our civilization put in jurisprudential terms, and the importance of it need not be laboured. M. Ruyssen's first lecture is a general survey of the problem, considered under three main headings: the place (*milieu*) in which man lives, the characteristics of man himself, and finally the structure of his group life. The first leads him into human geography, the second into anthropology, and the third into law and politics, with an interesting discussion of the place of state and individual in international law. In the other lectures he examines in more detail the nature of the economic community and its relation to politics ('bien que l'économique pèse lourdement sur les décisions politiques des gouvernements, c'est encore la politique qui domine l'économie et apporte aux peuples la ruine ou la prospérité'); the spiritual community, in the forms of religious and intellectual life; and finally the political community, including the growth of the sovereign state, the Concert system, and the idea of the League of Nations. It is not possible in this short notice to give more than a general indication of the content of these lectures. Thus to survey the nature and development of the group-life of mankind is obviously a difficult undertaking, spilling over the confines of so many subjects —philosophy, metaphysics, law, politics, economics, anthropology, and geography. Suffice it to say that M. Ruyssen succeeds admirably. His lectures are learned, wise, and lucid, and should be read by every international lawyer.

Baron Michel de Taube lectures on *L'Apport de Byzance au développement du droit international occidental.* Our historical memories, the Baron complains, are too short. Whenever a development is followed by a period of retrogression and then of resurgence, we easily forget the earlier period of progress or too easily assume that it was without influence on the later periods. We think of the progress of ideas as a continuing line, forgetting that it in fact is in cycles. This, he says, is true of the Byzantine contribution to modern international law, which, though substantial, is barely mentioned in the standard works. The civilizing influence of the Eastern Empire was a very real influence throughout the Middle Ages in Europe and thereby is linked with modern law. He then proceeds to demonstrate this thesis in detail, with an examination of the Byzantine ideas of the Christian community (which became the *Respublica christiana* of the Middle Ages) and the Byzantine laws concerning ambassadors, treaties, foreign merchants, capitulations, maritime rules, consular jurisdictions, the protection of religious minorities, humanitarian intervention, the pacific settlement of international disputes, and arbitration. The evidence adduced in these learned lectures is impressive and constitutes a very real challenge to the orthodox assumption that modern international law begins in the seventeenth century. It is, of course, nearly always possible to find interesting analogies of modern institutions in the former civilizations; but Baron de Taube makes out a strong case for the carrying over of Byzantine institutions into the modern law. It is a thesis which the historian of modern international law cannot afford to ignore.

The next course of lectures, *Problèmes soulevés en droit international privé par la législation sur l'expropriation*, is by Professor B. A. Wortley, of Manchester University. He begins with an interesting exercise in analytical jurisprudence, inquiring into the meaning of the concepts of property and expropriation, followed by a brief historical survey. He then deals with the problems of substantive law *seriatim.* These belong to the borderland between public and private international law: pirates, unrecognized insurgents, *de jure* and *de facto* recognition of governments, sovereign immunities of governments and public ships, state succession, and so forth. The reliance is mainly on common-law authorities. This is a stimulating analysis and critique of a large and difficult subject, whetting the appetite for the treatise on expropriation which Professor Wortley is preparing for the Cambridge Press series of Studies in International Law.

M. Camillo Barcia Trelles contributes a polished and authoritative study of *Fernando Vazquez de Menchaca* (1512–69), one of the most original and stimulating of the writers of the sixteenth-century Spanish school, and one frequently cited with approval by Grotius. His name is perhaps chiefly known for his early enunciation of a doctrine of the freedom of the high seas, but M. Trelles is able to show that his contribution was much more comprehensive than is commonly supposed. His reputation, says the author of these lectures, has often in the past been based on an imperfect acquaintance with his writings, which had their first modern edition as late as 1931. This is therefore a scholarly reassessment of the ideas of Vazquez on such important matters as sovereignty and the imperial idea, the general theory of international law, the freedom of the seas, and the law of war, which are considered not in isolation but are accurately placed in their proper context of contemporary thought and events: an important contribution to the doctrinal history of international law.

With the sixth and final course of lectures, by Professor Roger Picard of the University of Paris, we return to the modern substantive law: *Les ententes, libres ou obligatoires, de producteurs sur le plan national et sur le plan international*, a study of the economic and jurisprudential implications of national monopolies and international cartels. The first part, dealing with voluntary or obligatory industrial groupings on the municipal plane, is treated comparatively, summarizing the municipal legislations on the subject as they existed in the late nineteen-thirties. The second part illustrates the growth of various kinds of international cartels from the end of the First World War onwards. It discusses their legal position in public and private international law, and their repercussions on national and international policy. Cartels, he concludes, whether national or international in scope, constitute a part of the modern economy which must be accepted. They are true societies with their own institutions, laws, and jurisdictions. They are potential instruments for either good or evil which require constant study and careful regulation and guidance. The importance of this subject is obvious, yet it is one to which international lawyers, distracted by the problems of the sovereign state, have paid insufficient attention.

R. Y. J.

The Progressive Development of International Law. By HERBERT W. BRIGGS. Ismail Akgun Matbaasi. 1947. 46 pp.

This pamphlet contains, in both Turkish and English texts, five lectures delivered by Professor H. W. Briggs, of Cornell University, at Istanbul University in 1946–7. In Lecture I the role of international law is discussed. Professor Briggs holds that the problem of international law is not so much one of enforcement as of 'inadequate institutional development'. In the nineteenth century it was believed that, in guaranteeing their own security, states would contribute towards the establishment of world order, just as, according to the doctrine of *laisser-faire*, individuals in pursuing their own advantage would promote the general welfare. But this reliance on individual policies of national security is no longer enough. Nor is reliance on collective force. 'Force may be necessary to establish a situation in which government can function', but the role of international law is essentially creative. The emphasis placed by the Charter on social and economic problems is therefore commended.

In Lecture II there is a discussion on treaties, still the chief means of developing international law. Simplification of treaty-making, it is stressed, has not altered the fundamental rule that no state can be bound by a treaty without its assent.

In Lecture III Professor Briggs tackles the problem of Human Rights. He states that these rights have been most effectively secured in fact through bilateral treaties conceding extensive rights to aliens. He sees little advantage in declaring individuals to be subjects of international law or in giving them access to international tribunals. He commends the provisions of the Charter concerning Human Rights as an advance, but it is surely doubtful whether any really progressive development of international law is possible in this field within the framework of positivism.

In Lectures IV and V the problem of world government is discussed against the background of the atomic bomb. Professor Briggs condemns visionary thinking on this matter and pleads for 'evolutionary development'. He does well to point out that 'world government now' would inevitably mean universal totalitarianism, and he emphasizes that 'the present alternative to the United Nations is not world government but chaos'.

These lectures contain a forceful plea that an effort should be made to work with and through existing institutions, although there may not be general agreement that 'the United Nations Charter appears to provide adequate procedures for the progressive development of international law'.

D. H. N. JOHNSON

International Straits. By Erik Bruel. Copenhagen: Nyt Nordisk Forlag Arnold Busck; London: Sweet and Maxwell, Limited. 1947. 2 volumes, 278 and 424 pp. 32*s*. 6*d*.

This valuable work is an admirable example of the constructive contribution which can be made to international law by a careful and comprehensive study of state practice. The author has used extensively Foreign Office material from the archives of the Public Record Office, and has undertaken thorough and original research into the whole question of the legal position of international straits. An English translation of the book was completed of both volumes at the outbreak of war by Mr. H. M. Pratt, Barrister-at-Law of Lincoln's Inn, but thereafter the manuscript was transferred to Copenhagen for safety. Unhappily some of the manuscript was destroyed by aerial bombardment in spite of these precautions, and a new translation was made of Part I by Mr. Cai Byriel, Barrister-at-Law, Copenhagen. Notwithstanding these difficulties the work has been well produced and carefully written.

Volume I deals with the legal position of straits in general; volume II discusses in detail the legal position of particular straits: the Danish Straits, the Straits of Gibraltar, Magellan, and Dardanelles. The two volumes are scholarly and lucid in exposition. The author is known to have studied the question for many years, and before the war he lectured at the Hague Academy on the Danish Straits. Here, therefore, we have the fruits of prolonged reflection and research on a question of great practical importance. The results must be welcomed as a definitive contribution to the subject.

Volume I is divided into three Parts. Part I describes the legal position of straits at the time of the outbreak of the First World War. The author has collected the opinions of writers from the seventeenth century onwards, and has analysed and commented upon them. He also deals with the debates and proposals of the Institute of International Law and the International Law Association, the proceedings of the Hague Conference of 1907, the 'utterances of responsible statesmen', and the evidence provided by state practice generally since the middle of the nineteenth century. Altogether this is an impressive and useful collection of material, well arranged and treated with critical judgment. In Part II Dr. Bruel gives an account of the practice of states in the matter during the First World War, referring in this connexion to the action followed by Turkey, Chile, Sweden, and Denmark. In Part III he considers the development of international straits since the end of the First World War. Here it is convenient to find the views of writers actually published during the period in question, and it is useful to be able to compare these views with the opinions of writers belonging to an earlier period set out in Part I. In this part also there is a summary of the work of scientific bodies, the relevance of Articles 16 and 23(*e*) of the Covenant, the *Wimbledon* case, and the proceedings of the Hague Codification Conference of 1930. The appendixes contain projects of 'general straits conventions' by the Inter-Parliamentary Union in 1914 and by the Conference of Neutrals in 1916. There is also a useful bibliography.

On the basis of the material which he has thus collected Dr. Bruel reaches certain conclusions regarding the actual legal position of international straits. He points out that the various efforts to draw up a general straits convention, and the work done at The Hague in 1930, having failed to produce any results, the legal status of straits is still governed by certain general principles of law recognized by members of the international community. He considers, for example, that the middle-line boundary test is now generally accepted (and not the mid-channel test) in the case of straits whose coasts belong to different states, and whose width is less than the sum total of the territorial waters of each of the littoral states situated opposite each other. He stresses the historical and legal importance of Article 23(*e*) of the Covenant in its bearing on the general 'right of passage'. The Hague Codification Conference of 1930 produced, in his opinion, even greater certainty regarding the existence of this right, notwithstanding the absence of a formal convention recognizing it. Particularly was this the case (he says) with relation to the right of passage of warships, 'so that warships at any rate, in principle have the right to pass through territorial waters in straits in time of peace regardless of whether they may be taken to have the same right in the other parts of the territorial waters' (p. 202). The author discusses other very interesting questions such as what is 'innocent' passage (stressing the importance of an *objective* test and not one based on *intention*), and what rights the littoral state possesses in the matter of collecting dues, &c.

Dr. Bruel completes his first volume by presenting his own views *de lege ferenda*. He considers that there is no likelihood of a general straits convention in the near future, and that the development of the law will take place through the practice of individual 'strait-states'. Such development should, in his view, proceed on the following lines: (1) the outer border-lines of the straits should be determined by natural geography, i.e. the point at which 'in popular opinion' ocean and strait merge into each other; (2) the *thalweg* principle should be rejected in favour of the 'middle-line' boundary test; (3) certain limitations in regard to the right of the littoral state to legislate for territorial waters in the straits should be recognized. He makes a number of other very interesting suggestions, which cannot be set out in the space of a review, but which deserve close study.

Volume II is arranged on a similar chronological scheme to that adopted in volume I, i.e. the position before 1914 and the development during and since the First World War. An exhaustive account is given of the history of particular straits together with the actual rules and regulations pertaining thereto. A very full use is made of diplomatic and historical material.

This work will undoubtedly remain the standard treatise on the subject for a long time to come, and should be in every library of international law. Having regard to its importance in this respect, and to the variety and richness of the material handled here, it is a great pity that there is no index. It would also be an advantage in a book of this size if the author indicated, by short marginal comments, the main points at various stages. The occasional misprints and misspellings of English words are, of course, attributable to the difficult conditions in which the book was produced. Any future English edition should, however, be carefully revised with a view to removing these minor, though excusable, blemishes on a great work.

J. M. J.

The Control of Alien Property. Supplement to *Trading with the Enemy in World War II*. By MARTIN DOMKE. New York: Central Book Company. 1947. 334 pp. $7.50.

In 1943 Dr. Domke published a voluminous book on *Trading with the Enemy in World War II* which was reviewed in vol. 21 (1944), p. 237 of this *Year Book*. Under the title of *The Control of Alien Property* he has now published a supplement which, with the Addenda on pp. 279–317, brings the material up to the beginning of the current year.

Just as the first part did not deal with trading with the enemy in the usual sense of the term, but included many other subjects (such as frustration of contracts, internment and exclusion orders, treason, Axis looting practice, stateless persons, commissar legislation, recovery of foreign insurance policies), so the second part does not confine itself to matters relating to the control of alien property—indeed, it even deals with the control of American property in enemy territory. Both books really are devoted to the legal effects of war. The second volume does not contain a systematic treatment of the subject, but must be used in conjunction with the first, to which it adds page by page. Nor does it contain a great deal of discussion or analysis. The material which the author has collected, however, is formidable, and merits a tribute not only to his industry but also to the enviable facilities that exist in the United States of America.

F. A. MANN

Immunities and Privileges of International Officials. The Experience of the League of Nations. By MARTIN HILL. Published by the Carnegie Endowment for International Peace. 1946. 281 pp. $2.50.

Mr. Hill's work is of great value in that it breaks entirely new ground and makes readily accessible a selection of documents concerning the immunities and privileges of the League of Nations officials and of officials of the United Nations and the Specialized Agencies. The work should prove of great assistance not only to those who are immediately concerned with the problems which arise in connexion with the United Nations and the Specialized Agencies, but also as a contribution to that specialized field of international law which covers diplomatic privileges and immunities. As the book was prepared for publication about 1946, the documents referring to the United Nations and the Specialized Agencies are necessarily incomplete, and the last chapter of the book dealing with 'The Bases of the Post War Régime' is the least satisfactory. There is, for example, no detailed consideration of the question of the unification of the privileges and immunities of the Specialized Agencies which came up as an item on the agenda of the Second Regular Session of the General Assembly of the United Nations and was considered by the Sixth Committee.

The experience of the League of Nations in interpreting Article 7 (4) of the Covenant which provides that 'Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities' is of particular value in connexion with three issues which arise to-day in any consideration of diplomatic privileges and immunities. These issues are: What privileges and immunities, if any, are to be granted to subordinate officials? What degree of privileges and immunities can be claimed on behalf of nationals of the receiving State? If the doctrine of exterritoriality is to be discarded, on what basis are privileges and immunities granted to diplomatic representatives and the officials of international organizations to be justified? On all these problems Mr. Hill's book throws light. He has recorded in a most readable form the working of the régime based on the Agreements of 1921 and 1928 between Switzerland and the League of Nations, and the Agreement of 1928 with the Netherlands in respect of the Judges and officials of the Permanent Court of International Justice.

J. G.

La Jurisprudence des Prises Maritimes et le Droit International Privé. By R. Jambu-Merlin. Paris: Librairie Générale de Droit et de Jurisprudence. 1947. 335 pp.

The idea of examining those problems of private international law which are met in prize law is an attractive one, and the author, who himself is a *civiliste*, is to be commended for his bold attack on this virgin soil. His study is essentially one of private international law and not of prize law: prize cases are examined in order to see what light they shed on similar problems found in private international law. However, it is possible that the publication of this book in June 1947 is premature. The only prize decisions of the Second World War which were easily accessible to the author at the time of writing were those contained in Lloyd's *Prize Cases* (2nd series). At that time the French decisions had not been published, although the author had access to the files. Isolated accounts of German decisions were to be found, often in a garbled or incomplete form, in scattered European legal and shipping journals. And the author does not seem to have perused the four volumes of the Italian *Bollettino del Tribunale delle Prede.* Consequently there are many important decisions of which he seems unaware. Their absence gives his work a somewhat unfinished appearance.

The author's approach is as follows: prize law is generally regarded as a branch of public international law. In so far as it determines the rights and duties of states it is difficult to deny this classification. But one of its results is that prize law has been left entirely to the *jus gentium* despite the fact that the *civilistes* have something to say about it. For ships with their cargoes circulate from country to country, thus giving rise to problems of private international law. Prize law has as its effect the transfer of property, the extinction of rights, and their creation *ab novo*. These match the classic phases of private international law, namely, the creation of rights, corresponding to a judgment of condemnation, and the international efficacy of acquired rights. But 'creation of rights' has a particular connotation. The civil judge, in deciding an issue, effects a choice in favour of the party whose title or right appears the better according to private law. In prize, judgment is given in virtue of a rule of public international law which does not take into account the priorities of this or that creditor. The contest is between a subjective right of private law and a rule of the *jus gentium*. In other words, if there is room here for the rules of conflict, it is on the probative, and not on the decisive, level. The rules are not employed to determine to which of the litigants the *res* is to be adjudged, but to establish the facts which will permit the judge to apply the rules of prize law. On the other hand, the phase of the international efficacy of acquired rights reverts to private international law proper in order to determine the limits of state competence and the reasons for the international recognition of rights legitimately acquired. The object of this part of the study is to see if condemnatory judgments can be integrated into a general theory of the recognition of rights definitively constituted. With this approach the reviewer agrees, although it must be remembered that the civil courts do occasionally have to consider the effects of a seizure *jure belli* and of condemnation in prize, so that the prize decisions are not in themselves sufficient for a study of this nature.

After a brief introduction (pp. 13–21) describing the basic principles of prize law and prize jurisdictions, Book I, corresponding to the first phase, covers *deductio infra praesidia* and judgment. The first Part (pp. 32–166) examines proprietary rights, or what prize lawyers term 'national character' and 'transfer of property'. As befits a book on conflict, it also discusses the place of such doctrines as *ordre public*, principally in relation to the prohibition of intercourse with the enemy, and *fraude à la loi*, manifested in the attitude of prize courts to transfers *in transitu* and to the problem which arises where a neutral consignor of goods to an enemy has reserved property in them. This theoretical justification for such rules is novel, and, although not unsound, adds complications to a state of affairs which in its essentials is clear. Even the probative value of conflict rules is strictly limited to *ante bellum* transactions, which, it is true to say, are governed by the 'proper law' as conceived by the *forum*. In this connexion the author rightly points out that the proper law of the majority of peace-time international transactions is English law, so that the problem of conflict is not overt, especially in the English courts.

There follows a useful analysis of the criteria adopted by the prize courts to establish the national character of corporations and firms. The author sees a contradiction between the theory that in prize law ownership and hence nationality depends upon property and not upon risk, and the process which seeks to discover the real rather than the formal control of juridical persons. The weakness of this argument is that the risk test does govern *post bellum* transactions, as some recent English and French cases vividly illustrate. The author realizes that his difficulties are more theoretical than real. There are some pertinent remarks about applying the term 'nationality' to corporations; domicil, to be determined by the *siège social*, is preferred. The law of such domicil should be the 'personal law' of juridical persons. This is another illustration of the dangers of approaching prize law with the conceptions of private international law. The author is wandering away from considerations of the probative use of conflict rules.

Part II of Book I (pp. 169–230) deals with the rights of certain creditors. The reasoning of the Privy Council in *The Prins Knud* (1942), Ll.P.C. (2nd) 99, in recognizing the rights of salvors although it refuses to recognize those of other creditors is seen to contain what is termed *une brusque volte-face* (p. 200). In the reviewer's opinion this language is too strong. Even less does it lead to dangerous tendencies (p. 227). At worst these tendencies could be overcome by application of the author's own conceptions of *ordre public*. An interesting discussion on insurers omits to mention two cases, not in prize, which might have some bearing on the problem, namely, *Bank of New South Wales* v. *South British Insurance Co.*, 4 Ll.L. Reports 266 and 384, and *Allgemeine Versicherungsgesellschaft Helvetia* v. *Administrator of German Property*, [1931] 1 K.B. 672.

Book II (pp. 233–316), entitled 'L'Efficacité internationale des droits définitivement constitués', is suggestive and valuable; the author is on his home ground, and more sure of himself. After discussing the internal and international effect of prize judgments in extinguishing the rights of former proprietors and creditors, he has some interesting criticism of what is said to be the Anglo-Saxon doctrine. As expressed by Dicey (5th edn., p. 418), Halsbury (3rd edn., vol. v, p. 33), and others, the international efficacy of a prize judgment derives from the fact that it is a judgment *in rem*. An analysis of this doctrine shows that it is based on the following considerations: (*a*) the unreserved recognition of the competence of the *forum situs*, (*b*) the unreserved recognition of the competence of the *lex rei sitae*, and (*c*) the attribution of the authority of *res judicata* to the decision of the *forum situs* in virtue of its own law which is at the same time the *lex fori* and the *lex rei sitae*. This theory is criticized on the ground that the competence of the *forum situs* is artificial. The fact that the vessel is brought by force into the jurisdiction prevents the inclusion of prize judgments in the general system of private international law. The theoretical basis for the creation of rights under prize law, as under private international law, is therefore to be found in state competence; at the same time the transfer of a prize has a more intense force because it flows from a positive rule of international law. For this reason if a prize judgment is to have international validity it must accord with the rules of public international law, although there is no case-law to support this far-reaching argument. In examining the obstacles to the international efficacy of prize judgments, however, the author includes: the incompetence of the court—*vide The Cosmopolite* (1801), 1 English Prize Cases 321; violations of a rule of international law, the American case of *Williams* v. *Armroyd* (1813), 7 Cranch 423, being termed a 'pure sophistry'; as well as the general canons of private international law. It is a pity that the author did not consider the recent case of *The Janko* (1944), American Maritime Cases 659, which, by basing the international efficacy of a judgment of a Dutch prize court on comity, may have introduced a new complication into Anglo-American doctrine.

Finally, the role of treaties in prize law is examined, but the discussion of Article 440 of the Treaty of Versailles ignores Belgian cases such as *The Gelderland* and *The Rio Pardo* (noted in Verzijl, p. 1292), and international arbitrations such as *The Cysne* arbitration between Germany and Portugal. These arbitrations are of great importance for their attitude to *res judicata*. The ship restitution and reparations arrangements of 1945 are examined, without note being made that German ships handed over as reparations were regularly condemned by an Allied (usually the British) Prize Court before allocation under inter-Allied arrangements. This, of course, extinguishes satisfactorily (from the captor's point of view) third-party interests.

Among the omissions from this book are an analysis of the complicated problem of *locus standi in judicio*, and of the place of private international law in the ancillary jurisdiction of the prize court to decide questions of freight, average contribution, &c. There are a number of errors, of which the following list is not intended to be exhaustive: the statement on p. 16 that various international treaties were incorporated into British prize law by Order in Council of 5 August 1914 is erroneous; that Order deals only with procedure. The authority for considering the treaties as a source of prize law is the Royal Commission to the Prize Court. Jurisdiction in prize of British courts overseas flows from the combined effects of the Colonial Courts of Admiralty Act, 1890, the Prize Courts Act, 1894, the Prize Act, 1939, and the Royal Commission. It does not derive merely from an Order in Council (p. 20). Prize appeals are not heard by the Privy Council because that is usual in overseas appeals (p. 20). The reason is historical. In the earliest times prize appeals were heard by the Sovereign. The system of Lords Commissioners of Appeals in Prize Cases seems to have originated in 1628, receiving statutory recognition in the Prize Act of 1707. The Judicial Committee of the Privy Council became the appellate tribunal in 1832, and its jurisdiction has been expressly maintained by statute ever since. The doctrine of infection does not apply to all enemy property on board a ship carrying contraband, as is stated on p. 39, but only to non-contraband goods belonging to the owner of the contraband, the test being common ownership. This is correctly explained on p. 70 in discussing *The Kronprinsessan Margareta*, 2 B. & C.P.C. 409. Footnote 1 on p. 42 should contain a reference to *The Tergestea* (1941), *Bollettino del Tribunale delle Prede*, ii. 57. The statement (p. 156) that there were no Italian decisions concerning the nationality of corporations in the Second World War is incorrect: see *The Athinai*, part cargo *ex* (1942), *Bollettino*, ii. 404. The remark on p. 227 that nothing analogous to the Prize Claims Committee was set up in the Second World War may be misleading. The Committee's functions were actually performed by the Procurator-General: see House of Commons, *Official Report*, 9 April 1940, col. 496, and *The Courland*, *Lloyd's List* newspaper, 27 February 1943. The view expressed on p. 298 that *very few* ships were regularly condemned by the German Prize Court since 1939 may be questioned, although by an arrangement with the Vichy authorities of 16 May 1941 recourse to the German Prize Court was excluded for French shipowners.

Despite these criticisms this study is a valuable contribution to the literature both of prize law and of private international law which has, generally speaking, not paid sufficient attention to the rich material contained in the many prize judgments of all countries. It is to be hoped that Dr. Jambu-Merlin and others will be encouraged to continue these researches in the light of the new material continuously becoming available.

S. W. D. Rowson

A Modern Law of Nations. An Introduction. By Philip C. Jessup. New York: The Macmillan Company. 1948. 236 pp. $4.

The Hamilton Fish Professor of International Law in Columbia University discusses in this book, which is bound to prove one of the most outstanding and stimulating contributions to the literature of international law in the past decade, a number of topics from the point of view of two assumptions. The first assumption is that international law may be applicable directly not only to states but also to individuals and bodies other than states. The second is that breaches of international law are not the exclusive concern of the state directly aggrieved but also of the international community as a whole; this is what Professor Jessup describes as the community interest in the observance of international law. Of these two assumptions the first is the more persistent theme of the book. This is so perhaps for the reason that although Professor Jessup—in his desire to avoid any impression of overstatement—is content to treat the direct applicability of international law to individuals as a mere assumption, international practice has in many ways translated that hypothesis into rules of positive law. This applies not only to the various instances, before the First World War, of limited international personality in the case of pirates, recognized belligerents other than states, the Holy See, the subjection of individual members of the armed forces of belligerent states to the obligations of the law of war, and the like. It applies, in particular, to the more recent developments such as the recognition, in the Advisory Opinion of the Permanent Court of International Justice concerning the Jurisdiction of the Courts of Danzig, of the capacity of individuals to acquire rights under treaties; to the enactment, to some extent declaratory of international law, in the Charters of the International Military Tribunals of Nuremberg and Tokyo of the responsibility of individuals for criminal violations of international law; to the recognition, in the same instruments, of crimes against humanity—an enactment which indirectly acknowledges human rights the violation of which constitutes a crime even if perpetrated in obedience to the law of the state; and, above all, to the provisions of the Charter of the United Nations in the matter of human rights and fundamental freedoms.

With regard to this latter aspect of the recognition of the international personality of individuals Professor Jessup, notwithstanding some initial hesitation, leaves no doubt that, in his view, we are confronted with changes which are no mere hypothesis. He says: 'It is already the law, at least for members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties' (at p. 91). He is so convinced of the binding legal force of these provisions that he envisages the possibility of the courts of the United States invalidating some aspects of racial discrimination in that country—a development foreshadowed by the decision of the Court of Appeal of Ontario in *Re Drummond Wren*, [1945] 4 D.L.R. 674. As mentioned, the author does not arrive at this view as being the obvious interpretation of the Charter. He construes the Resolution of the General Assembly in the dispute between India and South Africa as suggesting that 'the general provisions of the Charter in the matter of human rights have *certain* obligatory force even before their explicit formulation' (at p. 88). The author's view on the subject may be contrasted with the opinion, frequently expressed, that the provisions of the Charter on the subject are in the nature of a general declaration of principle falling short of the imposition of a legal obligation binding the members of the United Nations to respect human rights and freedoms. It is a matter for satisfaction that he has rejected an interpretation which is unlikely to enhance the standing of the United Nations or, for that matter, of the science of international law. Professor Jessup is emphatic that, having regard to the provisions of the Charter in the matter of human rights and fundamental freedoms, the treatment by a state of its own nationals is no longer a matter which is 'essentially within the domestic jurisdiction of any State' in the sense of Article 2 (7) of the Charter.

Professor Jessup develops the two main theses of the book in five chapters entitled, respectively, 'The Subjects of the Modern Law of Nations', 'Recognition', 'Nationality and the Rights of Man', 'Responsibility of States', and 'The Law of Contractual Agreements'. The last two chapters—those on 'The Legal Regulation of the Use of Force' and 'The Rights and Duties in Case of Illegal Use of Force'—are less obviously germane to the principal topic. But they are of considerable interest as an example of the determination of the author to pursue to the full the possibilities inherent in the new international system embodied in the Charter of the United Nations—at a time when political realities have tempted writers to regard its provisions on the subject as destined to remain in the realm of theory for a long period to come. Thus in the last-named chapter Professor Jessup discusses in detail the various legal problems, in the sphere of the law of war and neutrality, arising out of the application of measures of enforcement under Chapter VII of the Charter. In the chapter on the legal regulation of the use of force he puts forward interesting suggestions, in accordance with his principal thesis, on making individuals directly responsible both to international law and to international jurisdiction—for instance, in cases of mob violence directed against alien groups. He points out that the argument usually adduced in favour of the doctrine of territoriality of criminal jurisdiction, such as the availability of witnesses, does not fully apply in cases where local feeling renders an impartial judicial process unlikely. On the other hand, it may be difficult to share Professor Jessup's view that organized economic boycott against a foreign state, even if not attended by violence, should be rendered internationally illegal and liable to punishment under the modern international system. That system does not purport to suppress immoral—or even illegal—state action unless it involves a threat to international peace. It does not provide for compulsory judicial determination of disputes unless they constitute a danger to international peace and security. In the circumstances, an economic boycott, conducted within the limits of the law of the country concerned, does not seem to merit automatic subjection to international criminal jurisdiction.

The first five chapters bear more directly upon the principal thesis of the book. In discussing 'independence' and 'interdependence' of states as the main subjects of international law the author makes the interesting suggestion that 'it would be more conformable both to the realities and the desiderata of the international community if, instead of emphasizing that each state is independent of every other, it were frankly asserted that each state is *dependent* on all other states, linked together in the society of nations or in a world government' (p. 37). He is of the opinion that the truly essential aspect of modern international life might be expressed, more accurately than is usually the case, by saying that 'every state has the quality of "interdependence" with every other state' (ibid.). In the chapter on Recognition the author develops in detail the notion and the procedure of collectivization of recognition—mainly within the framework of the United Nations. His criticism of the Estrada doctrine—a somewhat ineffectual device to solve the main difficulty inherent in the problem of recognition of governments—is clear and convincing. The chapter on 'Nationality and the Rights of Man' is particularly valuable. While fully in favour of the adoption of the principle that every individual shall be entitled to a nationality, he rightly points out that in a system of international law which embraces individuals as its direct subjects and grants to them a measure of procedural capacity, the present importance of nationality will tend to diminish. There will be many who will agree with him that, while it is desirable to determine by international agreement the basic principle of acquisition of nationality by birth, it matters little whether the choice will fall upon *jus soli* or *jus sanguinis*. The chapter includes an interesting discussion of the questions of emigration, immigration, and asylum and, above all, of the rights of man under the Charter and the proposed International Bill of the Rights of Man. With regard to the latter the author repeats the suggestion that the task might begin with a Declaration of Human Rights 'to serve as a standard and as a goal'. It is not explained how a Declaration which is not legally binding, which is not enforceable, and the main purpose of which would be, in fact, to provide a substitute for the assumption of a clear obligation to respect—and to cause to be respected—human rights and freedoms, can serve as a 'standard and a goal'. There is an element of danger in supplying governments with convenient devices which they may be all too ready to accept.

In the chapter on 'Responsibility of States' the author urges, once more, the advantages of conferring upon the individual—in accordance with his changed status as a subject of international law—the right to pursue international remedies in his own name. It may be difficult to advocate a reform of that nature at a time when many states have not yet seen their way to confer effectively compulsory jurisdiction upon international tribunals in relation to other states. But a beginning might be made by altering the present unnecessarily rigid formulation of Article 34 of the Statute of the International Court of Justice by permitting individuals to appear as parties with the consent of the states concerned. On the question of the basis of state responsibility Professor Jessup approves of both the theory of state responsibility based on fault (a notion which is in keeping with his thesis that international law regulates, in the last resort, the actions of individuals) and the doctrine of international responsibility based on the notion of 'risk allocation'—a solution which approaches the doctrine of absolute liability. There is no inevitable inconsistency in Professor Jessup's discussion of the subject, but perhaps some further explanation is indicated in the next edition. In connexion with state responsibility the author discusses in detail the various problems of claims, of the Calvo Clause, of the rule of nationality of claims—a somewhat artificial and, to a certain extent, already obsolete rule—and of the doctrine that injury to an individual is primarily an injury to his state.

In the chapter on 'The Law of Contractual Agreements' the author analyses international agreements concluded by bodies and persons other than states; the rule *pacta tertiis nec nocent nec prosunt* (a rule some interesting modifications of which he describes by reference to the two main theses of the book); the amendment and termination of agreements, in particular by reference to the doctrine *rebus sic stantibus*; and, finally, the question of violation of international agreements.

Professor Jessup's book—which is written in an easy, though studiously cautious, style—is a remarkable contribution for the reason, among others, that it can be read with profit both by the expert and by the student who has only a modest knowledge of the subject. It is to be hoped that it will be read and studied by both. The author utterly rejects the temptation, to which many have succumbed, to lean on a plausible and sceptical realism which reduces actual achievement to the category of wishful thinking. The science of international law has often lagged behind the developments of international practice; to that extent positivism has frequently served as a cloak covering an attitude of sterile conservatism. Occasionally—but only very occasionally—Professor Jessup's robust optimism seems to be open to challenge, but even then he is in good company. Thus he quotes with approval a statement by the late John Bassett Moore to the effect that on the whole international law is as well observed as municipal law. This view, shared by many international lawyers, probably errs on the side of complacency. The normal observance of international law in the daily intercourse of states does not compensate for its precariousness in the vital sphere of preservation of peace and of prevention of violence. Similarly, the author cites with approval the observation of the late Judge Cardozo that 'if the result of a definition [of law] is to make them [law and obedience to law] seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer realities' (*The Nature of the Judicial Process* (1928), p. 127). Obedience to law, in its principal manifestations, is not yet an overwhelming reality in the sphere of international law. There is no substantial gain in enlarging the definition of law so as to make it include, without reservations and as a matter of course, international law as at present constituted.

There are in this book various matters of detail which invite questions, such as the apparent hesitation of the author to express a definite view with regard to the validity of the plea of non-discrimination in the treatment of aliens, or his strictures upon the doctrine of retroactivity of recognition—a doctrine which, although questionable as a matter of logic, probably represents a sound principle of convenience not invariably inimical to injustice. However, these are controversial matters. The outstanding fact is that through Professor Jessup's book international law has been permanently enriched by a distinguished contribution of a leading scholar for whom international progress is both a growing reality and an article of faith.

H. LAUTERPACHT

The Double Taxation Conventions. By F. E. KOCH. In 2 volumes. Volume I: *Taxation of Income.* London: Stevens & Sons. 1947. xxiv+441 pp. 45*s*.

This volume deals with the series of bilateral conventions concluded in 1945–6 between the United Kingdom and, respectively, the United States of America, Canada, Southern Rhodesia, the Union of South Africa, Australia, and France. The conventions are highly technical and the need for an authoritative commentary was urgent and genuine. Mr. Koch's book is admirable in its comprehensiveness, lucidity, and economy. The Convention with the United States is treated as a prototype and is fully annotated; comment on the other conventions is confined to points on which they differ from the model. There is no duplication or overlapping and the space thus saved has been put to excellent use in a large number of appendixes (Orders in Council, Regulations, Circulars from the Board of Inland Revenue, &c.), all of which will be of great assistance to the practitioner.

To the international lawyer the appeal of the volume is considerable. The Convention with the United States marked a major change in British fiscal policy; it was the first *general* agreement of its kind between the United Kingdom and a country outside the British Empire. Moreover, the whole series of conventions follows a uniform pattern; in the shaping of that pattern substantial use was made of the studies in the avoidance of double taxation which had been carried on for more than two decades under the auspices of the League of Nations and the International Chamber of Commerce. Viewed against this background, the re-examination of the difficulties which still stand in the way of *multilateral* conventions on double taxation is highly topical; and Dr. Koch's two introductory chapters devoted to this problem are very stimulating indeed.

Double taxation occurs in three different classes of cases: first, where a person is taxed in one country on account of his personal status and in another country because the source of his income is there; secondly, one country may claim 'personal' tax on account of nationality, while another country will claim it on account of domicile or residence; thirdly, various countries may apply different tests of 'impersonal' liability, e.g. where one country taxes income because the assets which produce it are located within its jurisdiction, and another country because the income is collected within its borders. These and similar cases of double taxation have become increasingly burdensome since the rise in the rate of taxation, which began after the First World War. Indeed, the burden has become a matter transcending the private concerns of the taxpayer; each state has become vitally interested in opening up new sources of revenue by trying to eliminate foreign taxes on the foreign income of its nationals. However, the drafting of conventions to that end has been found extremely difficult, mainly because of the complexity of definitions which the various countries apply to conditions involving a liability to tax. National laws often define such liabilities by reference to technical or legal terms (residence, domicile, permanent establishment, control and management, sale, lease, succession) which have no uniform meaning; the position becomes even more complicated where national laws operate with reference to conditions obtaining in foreign countries. It is by no means easy to overcome these difficulties through the device of common definitions incorporated in international conventions. Not even the widest catalogue of terms can be exhaustive, and it has been found that conventions often employ definitions which both parties have *assumed* to command uniform construction, whereas in fact their respective courts give them widely different interpretations. Thus, when the subject of tax is a corporate body, that may mean in one country the *members* of that body, and in another the corporation as a separate legal entity. Again, 'residence' will be regarded in one country as the actual presence of a person for a certain minimum period; but other countries will look to other factors, such as a fixed abode or the intention to reside; in the case of corporations, residence and domicile present even more complicated problems. 'Permanent establishment' has also proved to be a difficult term, particularly in its application to such border-line cases as assembly-shops, research laboratories, or purchasing agents.

The main difficulty, however, lies in the fact that relief must be limited to taxes of the same or, at any rate, of a substantially similar character. But what are taxes of the same or of substantially similar character? No answer can be given without taking into consideration the entire tax system of the contracting parties, including the economic basis and the economic effect of taxation. It is difficult enough to ascertain the opposite number of a particular tax even in *one* foreign country; the difficulty is almost insuperable when we come to multilateral conventions. Hence the somewhat depressing conclusion in the *Report of the Fiscal Committee of the League of Nations*, 1938, that 'for the problem of fiscal evasion as for the problem of double taxation bilateral conventions are the only possibility. . . .'

Reference has already been made to the different meanings attributed to identical terms by the courts of different countries. These differences are all the more difficult to eliminate, as, for example, British and American courts are not bound by identical rules of construction. In England the courts are not free to seek guidance from the *travaux préparatoires* or from any other sources likely to offer enlightenment on the intentions of the contracting parties. Sir Sidney Rowlett's dictum (in *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue*, [1921] 2 K.B. 403): 'In a Taxing Act one has to look merely at what is clearly said. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used', is still a valid definition of the position of English courts. On the other hand, American courts 'have not strictly refused to contemplate the "history of the legislation" '; besides (at any rate, until recently) they have tended to construe fiscal legislation in favour of the taxpayer, faithful to the orthodox conception that taxes are the intrusion of Government on private property. This conception is now in the process of giving way to a stiffening attitude against tax avoidance; and, parallel to the reversal of policy, increasing emphasis is being placed on the principle that, even in the case of Taxing Acts, the purpose and intent of the law are more important than its mere words.

With the advent of the International Trade Organization the promotion of international conventions on double taxation is now likely to receive fresh impetus. To all those concerned with the problem—and the circle of individuals, corporations, and authorities so interested is rapidly growing—Mr. Koch's scholarly and thorough commentary will afford guidance of inestimable value.

A. M.

Recognition in International Law. By H. LAUTERPACHT, M.A., LL.D. Cambridge: Cambridge University Press. 1947. 442 pp. 25*s*.

As Professor Lauterpacht explains, this is a work intended as a monograph which has grown into a volume. It is, so far as the present writer knows, by far the most complete treatment of this important subject in any language. All persons interested in international law should acknowledge their indebtedness to the author for this most comprehensive study, which contains a most thorough treatment of the subject in all its aspects, backed up by the most comprehensive reference to precedents and authorities. The work is divided into four main parts, entitled 'Recognition of States', 'Recognition of Governments', 'Recognition of Belligerency and of Insurgency' (which includes a great deal of matter on piracy), and 'Problems of Recognition'. In this last part the author deals with *de facto* recognition, withdrawal of recognition and conditional recognition, implied recognition and the principle of non-recognition.

The main thesis of the work is that governments, in according recognition, are fulfilling a legal duty. The conditions, which justify the various forms of recognition, are laid down by international law, and governments are under a legal duty to grant the form of recognition which is appropriate to the facts of the case, no more and no less. What form of recognition the facts of the case justify is a matter of political appreciation, and therefore to this extent law and political judgment are inevitably interwoven. On the other hand, recognition is not a matter of pure policy, which a state is free to give or withhold for purely political reasons to suit its own interests, nor is it entitled to attach conditions to recognition. The quotation given in the footnote below[1] dealing with the recognition of states is a fair example of Professor Lauterpacht's main thesis and, incidentally, gives his solution of the doctrinal problem whether the recognition of states is constitutive or declaratory. In fact, the position with regard to recognition in general on Professor Lauterpacht's thesis is similar to the position under the Charter relating to the admission of new Members to the United Nations as recently expounded in a majority opinion of the International Court of Justice, where the Court held that, if a state fulfils the qualifications specified in the Charter, it has a right to become a Member of the United Nations, and, while it was a matter of political judgment whether in any given case a state does fulfil those qualifications, Members were under a duty to confine their attention to the state's qualifications and not allow themselves to be influenced by any extraneous political considerations.

Professor Lauterpacht abundantly proves that his thesis corresponds to what the international law *should* be, if a great part of international law is going to rest on any sound basis at all. Since the rights and duties of entities depend so largely on what they are held to be, it is in fact an intolerable situation if each government, as a matter of pure self-interested policy, can hold an entity to be just what it suits that government. In the reviewer's opinion Professor Lauterpacht makes a very fair case for showing that the law *is* in accordance with his thesis. The reviewer also thinks that, taking a broad view, the acceptance of Professor Lauterpacht's thesis relieves governments of far more political embarrassments than it creates.

Since recognition is a topic where there is abundant material in the form of precedents and opinions, where, in general, the weight of the precedents and material points in a certain direction, but where, nevertheless, there are untidy ends and controversial points, this topic would seem to be pre-eminently one of those suitable for consideration by the International Law Commission which the United Nations have just set up for the development of international law and its codification, and if that body should choose to adopt this topic it will have the greatest cause to be grateful to Professor Lauterpacht for his work. The greatest volume of material relates to the practice of the United States Government. It is, however, not possible to reconcile as consistent with principle every act and pronouncement of the United States Government in this field, especially since that Government became particularly deeply affected by the 'Principle of Non-Recognition' advocated in a great measure by Mr. Stimson. The Government of the United Kingdom has in general been more conservative and less vocal in its acts and pronouncements, but the reviewer does not think that all the conduct of the United Kingdom in this sphere can be defended as consistent. Some inconsistency is to be expected in a field where the rules of law and policy had not been clearly defined, and where, on some occasions, governments have recourse to their legal advisers and on others proceed as if nothing else except policy is involved. Possibly Professor Lauterpacht sometimes goes too far in trying to reconcile the irreconcilable. The general trend of the precedents is clear enough without this.

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[1] 'To recognize a political community as a State is to declare that it fulfils the conditions of statehood as required by international law. If these conditions are present, the existing States are under the duty to grant recognition. In the absence of an international organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfil that function in their capacity as organs of international law. In thus acting they administer the law of nations. This legal rule signifies that in granting or withholding recognition States do not claim and are not entitled to serve exclusively the interests of their national policy and convenience regardless of the principles of international law in the matter. Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfilment of a legal duty, is constitutive, as between the recognizing State and the community so recognized, of international rights and duties associated with full statehood' (at p. 6).

It is the task of a reviewer to give his criticisms as well as his praise, and the present writer has two main criticisms to make of a work for which he has the highest admiration. The first is that the book is at present not altogether easy reading because the material is perhaps not quite fully digested. A second edition would probably result in the conclusions standing out more clearly. The second main criticism is that the work would be immensely improved if the author had to a greater extent carried out his principles to their logical conclusion.

There may be said to be six forms of recognition in connexion with entities (we leave aside here questions of recognition of a piece of territory as belonging to a particular state, a matter with which, incidentally, the author hardly deals), namely, recognition of:

(1) a state *de jure*;
(2) a state *de facto*;
(3) an entity as the *de jure* government of a state;
(4) an entity as the *de facto* government of a state;
(5) an entity as entitled to the rights of belligerency;
(6) an entity entitled to be considered as an insurgent government or authority.

Now, in the reviewer's opinion, each of these forms of recognition is appropriate under conditions which are in general terms legally defined. Further consequences in the forms of different rights and obligations follow from each form of recognition. Consequently, it is the greatest mistake in practice to put the question: 'Is Ruritania recognized?' or 'Is the Atlantis Government recognized?' On the contrary, the question should be: 'Is Ruritania recognized as a state *de jure* or *de facto*?' 'Is the Atlantis Government recognized as the *de jure* or *de facto* government of a state or as an insurgent authority?' If the question is always put and answered in this way, more than half the confusions and difficulties attending the problem of recognition answer themselves. It would appear that from time to time Professor Lauterpacht falls into vague or unsatisfactory statements simply because he has used the word 'recognized' alone and, having done so, failed at times to see the solution. Moreover, this method of treatment solves a large number of the difficulties which Professor Lauterpacht discusses in his chapter on implied recognition, in the reviewer's opinion the least satisfactory chapter of the book.

In connexion with implied recognition there are really two principles, namely, (1) that since you are implying intention from conduct you are not entitled to imply anything which there was clearly no intention to grant, and (2) that the law does not permit a government simultaneously to blow hot and cold or, in more vulgar terms, to have it both ways. It cannot engage in conduct which is only appropriate if a certain form of recognition is granted and yet say that it has not granted that recognition. Professor Lauterpacht mentions both principles, but in fact he only gives weight to the first. Yet it is failure to apply the second which mostly produces those situations which bring international law into contempt. The true answer to problems of implied recognition is generally found in the fact that the conduct in question implied recognition of an entity as a *de facto* government, but not *de jure*, or in the recognition of an entity as an insurgent authority only. But it should be clear law that every official dealing with an entity implies its recognition by the government dealing with it as something, and the question is merely what.

The reviewer finds the chapter on the principle of non-recognition more satisfactory, but even so considers that there are again two principles involved here and that Professor Lauterpacht has given rather undue weight to one of them. The two principles involved here are (i) that it is wrong to recognize a situation brought about contrary to international law; (ii) that international law must recognize established facts which are not corrected because, if it does not, a confused situation arises, which involves further injustices to individuals, and generally results in states trying to 'blow hot and cold' at the same time, and to say that they have not recognized an entity as something when in fact their conduct makes it clear that they must have so recognized it. Again, here, the solution generally lies in the distinction between recognition *de facto* and *de jure*, *de facto* recognition fully satisfying principle (ii) while not offending principle (i). The attempt made to extend the principle of non-recognition to exclude *de facto* recognition of established situations has not, in the present writer's opinion, led to any creditable results.

On a point of detail, Professor Lauterpacht spends what is possibly an excessive amount of space in criticizing the case of *The Arantzazu Mendi*, a case in which there was a singular unanimity of English judicial opinion. This was a case in which, right up to the House of Lords, every English judge held that the Government of General Franco should be entitled to immunity from suit in the English courts, when it was only recognized as an insurgent *de facto* government exercising authority over a portion of Spain. Professor Lauterpacht, who is a just controvertialist, ultimately finds only one point of criticism, and that is the following. It is not right that such a *de facto* insurgent government should be held to be a sovereign government when there is a *de jure* government of the same state still in existence. Professor Lauterpacht considers that the decision implied this because General Franco's Government was given those immunities from suit which are commonly described as those of the government of a sovereign state. But Professor Lauterpacht does not observe that, though the immunities are described in this way, there are many governments, which cannot possibly be described as sovereign in the international sense, which nevertheless enjoy them, such as, for instance, the governments of the rulers of British protected states which, from the point of view of international law, as opposed to internal law, are not sovereign at all.

Professor Lauterpacht includes in his volume a number of Opinions of the English Law Officers obtained prior to 1890 which are available at the Record Office. This is useful, but, in the opinion of the reviewer, it would have been more useful if there had been fewer of these Opinions, and a fuller statement of the facts and circumstances to which they relate, coupled on occasion with an indication of the Foreign Office minutes or action taken on them. The facts necessary to appreciate them by no means always appear on a mere reproduction of the Opinion and the reviewer believes that one or two of them have been misunderstood.

Lastly, Professor Lauterpacht touches on the very difficult problems which arise in connexion with action by collectivities of states such as a United Nations which imply a recognition or non-recognition of a state or a government. This is a problem which really requires a special study of its own, and it is by no means easy to see a solution of the problems which it raises.

E.

Law Reports of Trials of War Criminals. Selected and prepared by the United Nations War Crimes Commission. Vol. I (1947), xi+127 pp. (2*s.* 6*d.*); Vol. II (1947), xii+156 pp. (3*s.*); Vol. III (1948), xi+123 pp. (5*s.*). London: His Majesty's Stationery Office.

These are the first three of a series of fifteen volumes which are to report in summary form the most important of the war crimes trials of the 'minor war criminals'; these are the criminals who fall within the first category of the Moscow Declaration of 30 October 1943 (the term covers all war criminals except those tried by the International Military Tribunals at Nuremberg and Tokyo). The trials reported are necessarily only examples, and they have been selected for their legal, municipal, or international interest. The three volumes contain the outlines of the proceedings of twenty trials, and appended to each report is a section headed 'Notes on the case', containing explanatory comments on legal matters arising in the trial in question. Volume II is confined to the Belsen Trial, and the voluminous mass of evidence has been skilfully condensed. The volumes include brief notes on the British, United States, Norwegian, and French laws concerning trials of war criminals. Each volume includes a Foreword by Lord Wright, the Chairman of the United Nations War Crimes Commission.

In these reports many points of very great legal interest arise. Even though they do not always receive elaborate resolution, they are usually clearly defined and adverted to. With regard to the British trials, the summing-up by the Judge Advocate is usually of great value. In the American trials the law usually has to be deduced from the arguments of the Defence and the Prosecution, and from the verdict. The two judgments of the Supreme Court of Norway are more elaborate, as is also that of the Cour de Cassation. There emerges a valuable body of jurisprudence, dealing with such matters as the pleas of respondeat superior, legitimate reprisals, operational necessity, and lack of jurisdiction. Such a jurisprudence is of obvious value, and it may be hoped that those parts of it which have not been much refined will receive further treatment in the twelve volumes still to be published. Thus it is essential that the term *mens rea*, which is used in varying senses throughout the volumes, should be clearly defined, and that the effect upon it of reliance both on superior orders and on the belief in legitimate reprisals should be elaborated in greater detail and more coherently. These reports should be of very great value if, unfortunately, this branch of international law has to function extensively in the future.

M. W. PARKINGTON

Recueil de lois modernes concernant le Droit International Privé. Compiled by E. M. MEIJERS. Leiden: Universitaire Pers Leiden. 1947. viii+100 pp.

This is a short reader for the use, primarily, of undergraduates. No collection of this kind has been published since Makarov's *Das internationale Privatrecht der europäischen und aussereuropäischen Staaten* (Berlin, 1929), and Professor Meijers's little book undoubtedly fills a gap.

Chronologically, the selection begins with the Italian Civil Code of 1865 and ends with the Treaty of Montevideo of March 1940. Geographically, there is no aspiration to completeness; apart from the Treaty of Montevideo (between Uruguay, Colombia, Bolivia, Argentina, Peru, and Paraguay) only nine countries are represented: China, Germany, Greece, Italy, Japan, Liechtenstein, Poland, Siam, and Switzerland. This puts a certain limitation on the usefulness of the book; the reader is left without any guidance as to the state or sources of private international law in, for example, France or the Anglo-Saxon countries.

However, the few enactments reproduced in the volume are sufficient to bear out the crucial point made by Professor Meijers in his brief and masterly preface; i.e. that private international law is just now in a state of transition from the overriding principle of nationality to that of domicile. No illustration of that thesis could be more striking than the Treaty of Montevideo, with its broad declaration that the existence and capacity of both physical and juristic persons are governed by the law of their domicile; and the draft Bill (1939) of the French Committee on Private International Law shows impressively how far legal opinion has moved towards the same principle in a country which was the first to proclaim that capacity and status must be governed by the law of nationality. Professor Meijers adds a much-needed word of caution against the present tendency to assume that the *lex domicilii* will succeed more easily than did the *lex patriae*, in providing a basis for wide international conventions; his warning that strong opposition is likely to come from governments faced with large-scale emigration is both timely and shrewd.

A. M.

International Law, Vol. I (Peace). By L. Oppenheim. Sixth edition by H. Lauterpacht, M.A., LL.D. London: Longmans, Green & Co. 1947. liii+940 pp. 70*s*.

'Oppenheim' has a very special place in the literature of public international law in this country. For the serious student there is no alternative. Teachers and their pupils who, in the immediate post-war years when the stocks of the fifth edition of vol. I were running out, had to try to do without one, will need no persuading of that. This sixth edition was therefore urgently needed. It appears just ten years after its predecessor, and they were years full of changes in the law. Indeed, the law is still in transition, so that it must have been uncommonly difficult this time to decide not only what new material to put in but also what to leave out. Professor Lauterpacht has carried out his unenviable task admirably and this is probably the most useful version of Oppenheim that has yet appeared. In spite of some omissions and curtailments, the 819 pages have grown to 940, but thanks to austerity standards of printing and paper the new volume is even easier to handle than the earlier and shorter one.

All users of the book will be thankful that the editor has not hesitated to rewrite the text whenever it seemed necessary. In this way the footnotes can be used, as they should be, to elaborate the text: not to contradict it. The new material is very considerable. For example, the section on recognition is extended and greatly improved, the section on air law has been rewritten and now gives a much clearer picture of the state of that branch of the law; there are entirely new sections on trusteeship, the criminal responsibility of states, human rights, inter-governmental and inter-departmental agreements, international commodity agreements, and much else: the introduction lists forty-seven new or practically new sections. The most important new topic is, of course, the United Nations. This is treated in a chapter headed 'The Legal Organization of the International Community', which has a short but illuminating general introduction followed by descriptions first of the League of Nations and then of the United Nations Organization. The original treatment of the League of Nations has been cut by about a third, but it still occupies almost as much space as the United Nations. This is not an entirely satisfactory compromise, but it was inevitable in an edition prepared shortly after the United Nations had come into being. For the same reason the treatment of that turgid and obscure document, the Charter of the United Nations, is necessarily general and somewhat tentative. There is now sufficient material and experience for the much fuller discussion of the United Nations which presumably will be forthcoming in the next edition, when space can be found for it by cutting the description of the League of Nations to just so much as is essential for the quite general comparisons that the average student needs to be able to make.

Oppenheim's original work was simply an elementary text-book, but the erudition of successive editors has also made of it a standard work of reference. Professor Lauterpacht has put an enormous amount of work into this part of his task. The references to treatises and articles have been thoroughly revised throughout, making it at once text-book and bibliography. At the same time the references to decided cases have been greatly expanded, providing a convenient source for references to the more important cases on almost any topic. The painstaking work on the reference side of the volume is to be welcomed not only for the specialist who will want to follow up the references, but also for the ordinary student, because it does make him aware of the place of authorities in the development of the law and discourages the superstition that international law is a body of rules 'which lawyers have evolved out of their inner consciousness'.

This edition of Oppenheim could hardly have been better done. Nevertheless, it is apparent that something more will be required soon. The law is changing rapidly, not merely in content but also in form. The new law, with its emphasis on institutions and administration, resists more and more strongly the attempt to force it into a framework originally evolved before the First World War. What we really need at this stage is a brand-new general treatise, of the same proportions and stature as Oppenheim, but differently planned. No one is better qualified to write it than the learned editor of Oppenheim and we look forward to the time when he will fill the gap by producing a general treatise of his own.

R. Y. J.

A Text-Book of International Law. By Alf Ross, LL.D., Ph.D. With an Introduction by Professor J. L. Brierly, O.B.E., D.C.L. London: Longmans, Green & Co. 1947. 304 pp. 21*s.*

This book is the work of the Professor of International Law in the University of Copenhagen and has been well translated from the Danish original. As the author states, it is not intended to compete with the major text-books in the English language, but is presented as 'an analysis of the fundamental concept and problems of International Law on the basis of a specifically Scandinavian view of the nature of law and the aims of Jurisprudence'. It is therefore not surprising that a whole third of the book is taken up with the problem of the concept of International Law and its sources.

International Law is defined as 'the law valid for (binding upon) self-governing communities'. The author prefers the term 'self-governing communities' to 'states' on the ground that a state cannot be defined except in relation to International Law, and also because of the problem presented by federal states. This, however, does not alter the fundamental fact that, according to the author, the rules of International Law are not directly binding on individuals. 'Self-governing communities', he says, 'and these alone are capable of international duties.' He then divides all law into Internal Law, binding on individuals, and International Law, binding on self-governing communities. The author comes out strongly in favour of the dualist conception of International Law, and the substitution of 'self-governing communities' for 'states' in the definition, far from leading to an interesting new approach to a fundamental problem, turns out to be only dualism under a new guise. It is disappointing that no mention is made of recent contributions to this branch of the law, such as the United Nations Charter and the Charter and Judgment of the International Military Tribunal. In the light of these documents it is surely doubtful whether 'only a self-governing community can be capable of international duties'.

The author rightly draws attention to the stumbling-block of absolute sovereignty, conceived as a quality of states from which certain effects follow. It is imperative, he says, that self-government, capacity of action, and liberty of conduct should no longer be regarded as 'effects of sovereignty' but as 'positive legal situations created directly by rules of law'. The unanimity principle and the principle of the equality of states are exercising a serious reactionary influence mainly because the concept of sovereignty has enabled them to acquire a dogmatic validity out of proportion to their real merit.

As regards the question whether International Law is really law, Professor Ross concludes that it is 'of a conventional non-compulsory order with a derived character of law'. Being conventional, it differs from personal morality. It differs from municipal law, on the other hand, because it 'lacks an effective instrument of enforcement by compulsion'. War is not effective in this connexion because it has neither the regularity of application nor the certainty of result characteristic of a means of enforcing the law within the state. Yet International Law is law because it is felt to be law and because some of its fundamental maxims, such as *pacta sunt servanda*, are similar to the maxims of national law. Its deficiencies are only too well known, but the author does well to stress as one of the gravest of these the fact that, in an age when raw materials, national economic policies, and questions of immigration are among the most potent causes of conflict, these problems are scarcely touched by International Law.

A restrained welcome is given to the revival of naturalist tendencies in International Law, but a liberal interpretation of the term 'the general principles of law recognized by civilized nations', so as to include *a priori* sources of law, is discouraged. 'There is an ambiguity', says the author, in the term 'positivism'. It can be defined both as 'what is based on experience' and as 'what is formally established'. The reaction against positivism is justified with respect to the latter, but not with respect to the former meaning. 'A realistic doctrine of the sources of law is based on experience but recognizes that not all sources are positive in the sense that they are formally established.'

The treatment of the subjects and objects of International Law follows traditional lines. The law relating to war and neutrality is not discussed, and the ground covered is similar to that of Oppenheim, vol. i, except that a chapter on 'the settlement of state differences' is included. In this the author accepts the traditional distinction between legal and political disputes, but insists that it be made more detailed. He is opposed to attempts to extend obligatory jurisdiction to spheres where it would not be suitable, and he cites the failure of the Central American Court of Justice as a warning.

Professor Ross has recourse to the Danish law of agency, the basis of which is the extent of the agent's authority as it appears to a third party, for a solution of the problem of competence to bind the state by treaty. He concludes that 'international effectivity must be ascribed to definite constitutional precepts for the consent of the legislative assembly or one of its houses or for a plebiscite, but not, on the other hand, to precepts for the matter to be dealt with in a state council, or precepts for the verdict of a commission concerned with foreign affairs, or demands for the consent of the politically leading house, not in consequence of a particular precept but in accord with general political maxims'. In addition, the chapter on treaties contains an excellent, though brief, discussion of the questions of ratification and the clausula *rebus sic stantibus*.

There are also competent chapters on State Territory, on States as Subjects of International Law, and on State Responsibility. In the matter of Recognition the author accepts the declaratory view and refers to the constitutive view as 'this practically absurd theory'. The reason why it is absurd is that states cannot be supposed to be entirely outside the law or incapable of concluding agreements simply because they are not recognized. Recognition is likened to 'the declaration by which a person in civil law admits the existence of a debt'. Naturally, therefore, the author concludes that there is little difference, and certainly no legal difference, between *de jure* and *de facto* recognition and that there is no obligation to recognize a new state.

Altogether, this is an interesting book for a fairly advanced student: but the space devoted to philosophical discussion as opposed to concrete examples renders it inappropriate as a text-book in the normal sense.

D. H. N. JOHNSON

Les Sources du Droit International. By MAX SØRENSEN. Copenhagen. 1946. 274 pp.

This study was completed in the summer of 1945 before the San Francisco Conference had finished its work, and, therefore, before the Permanent Court of International Justice had been replaced by the new International Court of Justice. However, as is well known, the Statute of the new Court follows so closely that of the old Court that in all essential points there is no difference. The continuity of the administration of international justice begun in 1920 is thus preserved in a remarkable degree. Moreover, the body of jurisprudence built up by the old Court will doubtless be utilized by the new.

This is an important and scholarly piece of research, and is the result of several years' work at the Institut Universitaire des Hautes Études Internationales at Geneva; and it is an encouraging thought that this work was pursued at a time when the whole of Europe appeared to be dissolving into anarchy. It is, in fact, a detailed study of Article 38 of the Statute of the Court as applied in its decisions, and the author displays considerable skill and ability in organizing his material under the various sources of law enumerated in Article 38. He begins by examining the theory of sources in general, and in this field he does not throw out any new or startling ideas, but contents himself with stating the doctrines of others. In particular, he introduces us to Alf Ross, a Danish writer whose work is not as yet well known in this country, his text-book on international law having been published in 1942. Ross's theory of sources is clearly strongly influenced by much American writing on jurisprudence, his view being that the study of the sources of law is mainly occupied with the general elements which enter into the judicial process and which present themselves to the judge as binding by virtue of a sort of social necessity. It is not clear to the reviewer how this theory can conveniently be applied in the international field where an international tribunal is composed, and is expected to be composed, of elements representing all the main civilized systems of law in the world, and includes judges of extremely diverse national and social traditions. It is difficult, moreover, to extract from the careful formulation of principles which is found in the judgments of the International Court a sufficiently clear indication of those principles which are attributable to social necessity. The judicial process of the International Court is so entirely different from that of any municipal court that an examination of the problem of sources on these lines is not likely to be fruitful. It is believed that most English international lawyers would prefer the approach of Strupp and Anzilotti, according to which Article 38 is the *formal* source of all the principles formulated in it, and it is from that Article that the sources derive, so far as the Court is concerned, their force and validity. However, it is in the detailed examination of Article 38, rather than in the general theory of sources of law, that M. Sørensen's book is particularly valuable. He examines, in order, conventions and other international agreements, custom, principles of international law, the general principles of law, judicial decisions, doctrine, and equity, from this point of view. He then deals, in an illuminating chapter, with the interpretation of treaties, which he rightly stresses as not being an arbitrary function; but, with equal pertinence, he points out that many of the principles which are said to govern the subject are found in practice to be little more than signposts. He criticizes, for example, the doctrine that where a treaty is not clear the Court may resort to the preparatory work, and observes that this rule is a poor guide because it is not possible to discover whether a treaty stipulation is, or is not, clear, except after a full examination of the contents of the treaty and all surrounding circumstances. However, he admits that the Court has been consistent in refusing to allow preparatory work to be used in the first instance. At some points it seems that the author is perhaps not critical enough; for example, at page 227 he refers to interpretation 'in the light of the application of the treaty by the parties', but he fails to observe the weakness of this source of interpretation, which is that it is extremely difficult to know whether what the parties have done is, or is not, in fulfilment of the treaty. As this is in practice the question most frequently at issue, to look at their conduct in the matter is often simply to turn in a vicious circle.

One point which emerges clearly from this study is the remarkable influence that the Court has had upon continental jurists in the direction of impressing them with the creative function of the judge as opposed to the idea that he is merely a mouthpiece. The author is to be congratulated on a work which will take an outstanding place in the literature dealing with the sources of international law, and in producing it at such an opportune moment. We would observe that the bibliography, although otherwise complete, contains no reference to the article by Mr. Walter Jones in the 1935 volume of this *Year Book*, nor, in connexion with the important and interesting question of the influence of international organizations as a source of law, does the author refer to the many writings of Mr. Wilfred Jenks, in which this theme has been so richly developed.

J. M. J.

Air Power and War Rights. By J. M. Spaight, C.B., C.B.E. Third edition. London: Longmans, Green & Co. 1947. 523 pp. 25*s.*

Mr. Spaight's works on air law are known to all serious students of the subject. *Air Power and War Rights* is probably the best known of all, and the call for a third edition amply testifies to its value. The general framework and material of the second edition remain almost without change, but there is now added a great deal of new material from the Second World War, including a discussion of the use of the atom bomb, a method of warfare which Mr. Spaight considers of questionable legality: 'international law cannot trim its sails so quickly to the winds of expediency as that.' He sees no reason, however, to make any radical change in his general conclusions on the place of air power in the law, believing as he does that 'the tremendous events of 1939–45 left the law of the air substantially as it was after the war of 1914–18'.

The book is by no means confined to those parts of the law which are peculiar to the air arm: it covers all branches of the laws of war and neutrality which may be relevant to the conduct of air warfare, including, for example, the opening of hostilities, the treatment of prisoners of war, neutral volunteers and supplies, and so forth. The emphasis, however, is always on air power rather than on war rights. Mr. Spaight's hero is the pilot rather than the judge. Thus the strength of the work lies not so much in legal analysis as in its very rich store of examples and incidents of actual practice. Drawn from every conceivable source—memoirs, letters, speeches, broadcasts, communiqués, state papers, newspapers, and many others—a quite extraordinary range of materials is here assembled with that love of detail which betrays the real enthusiast. No one would accuse Mr. Spaight of elegant writing; but his preference always for the concrete instance or anecdote and his intense sincerity combine to make one of the most readable of text-books, so that even an intrinsically dull subject like the history of aircraft markings becomes almost fascinating in his hands. Some of it, indeed, for instance the chapter on 'special missions', is even thrilling. The lawyer may not always be persuaded by Mr. Spaight's conclusions on the law: but he would be an ill-advised lawyer who attempted to reach his own conclusions on this subject without first consulting the material that Mr. Spaight so lavishly provides.

R. Y. J.

Grundlinien der Antiken Rechts- und Staatsphilosophie. By Dr. Alfred Verdross-Drossberg. Vienna: Springer Verlag. 1946.

This is the first volume in a new series of text-books published under the auspices of the Faculty of Law and Political Sciences of the University of Vienna.

Professor Verdross-Drossberg's 'Outline' differs from the traditional pattern of text-books on the same subject in that it deals in full detail with the pre-Socratic theories of law and state and declines to regard Plato and Aristotle as the only outstanding exponents of Greek political philosophy. The principles of direct democracy are shown to have been fairly well elaborated before Plato and, consequently, the *Republic* and the *Laws* are put in a perspective which is somewhat unusual in continental literature: both works are presented as attempts to halt the progressive disintegration of the existing political system rather than as blue-prints for an ideal state. In any case, the author regards the *Laws* (and not the *Republic*) as Plato's final word on political theory; from this assessment there follows logically the refutation of Kelsen's conception of Platonic philosophy as an ideology of autocracy. For Professor Verdross-Drossberg, the salient characteristic of the Platonic State is not its semi-aristocratic structure, but its essential pacifism; and his emphasis lies not on the state as an end in itself but on the rule of law. In this context he puts great stress on the point that Plato's theory of the rule of law was not confined to relationships within the state, but contained all the essential elements of a rudimentary law of nations based on the pacific settlement of inter-state disputes. Herein, precisely, lies the connecting link between Plato and the Stoics' humanistic philosophy of law.

For many decades the German literature of Platonism has oscillated between the two extremes of romantic worship and Nietzscheian deprecation. Professor Verdross-Drossberg's dispassionate and careful assessment of Plato's role as 'a bridge between two distinct chapters of history' is an important contribution to a highly controversial subject.

A. M.

The Conflict of Laws in Matters of Personal Status in Palestine. By DR. E. VITTA. Tel-Aviv: S. Bursi, Ltd. 1947. 315 pp.

Palestine is a laboratory of law as well as of social experiments. In no country, perhaps, is the legal system, particularly in matters of personal status, so elaborate and so brimful of problems and possible conflicts. When the constitution of the mandatory government was defined by the Palestine Order in Council, 1922—issued under the Foreign Jurisdiction Act, 1890—it was decided to maintain in force for matters of personal status of Palestinians the religious jurisdictions of the Moslems, the Jews, and the Christians, which were part of the Ottoman system of *laissez-juger*. At the same time, the civil courts received concurrent jurisdiction in certain topics of the personal status of Jews and Christians, but not of Moslems. For British and foreign subjects, also, there was divided jurisdiction. While, primarily, the civil courts dealt with their matters of personal status according to the law of the nationality—or of the domicile, if the national law refers to that principle, as in the Anglo-Saxon systems—the religious courts had jurisdiction and could apply the religious law if all the parties concerned agreed to that course. There were, however, restrictions upon the competence of the religious courts. They were prohibited from granting a divorce or nullity of marriage in the case of foreign subjects.

The legislator foresaw that conflicts would arise between the civil courts and the religious courts, and provided a special tribunal for solving them—probably a unique institution in a British administration. The special court is composed of the British Chief Justice and another British Judge of the Supreme Court, sitting with the head or heads of the religious courts whose jurisdiction is in question. It is concerned mainly with questions of qualification of the Act. In addition, the Chief Justice was given power, by Order in Council, to determine, in a case where any action of personal status involves persons of different religious communities, which court should have jurisdiction. The judgment of the religious court is executed by the process of the civil court. Thus further opportunity is given to challenge it on the ground of excess of jurisdiction or of failure to observe the principles of natural justice in the procedure. It will be readily understood that the pattern is complicated. The gathering in Palestine of Jews and Christians from all parts of the world has multiplied the occasions for legal tangles. The field was set for conflicts both of ordinary private international law and of the inter-religious law of personal status. The litigious energy of the people of Palestine, the intricacies of the subject itself, and lastly the abundance and ingenuity of the advocates, have led to a full use of these opportunities.

One distinctive feature of the Palestine legal scene is the abundance of law reports edited and annotated by skilled lawyers. The result is that every judgment of the courts in the difficult questions of personal status and of conflicts is fully reported. A wealth, an embarrassing wealth, of precedents is piled up to guide or baffle the practitioner.

This book, written by an Italian jurist who has lived in Palestine for ten years and is a Lecturer in the Law Classes of the Government and in the Law School of Tel-Aviv, is a thorough examination of all this material, as well as of the legislation and the principles of the law concerning personal status. Dr. Frederick Goadby, who was the original Director of the Law Classes of the Government, wrote a first study of the subject some years ago; but in his day the courts had not been called upon to give many judgments. It is a remarkable tribute to the industry and adaptability of Dr. Vitta that he has made himself master not only of all the cases and the literature, but of the English legal idiom. His book is not only clear and readable. It is an original and valuable contribution to the science of private international law.

The special Court of Conflicts in Palestine has to deal with problems which are novel in the English literature on the subject. For example, there came before it the question of what is a Jewish marriage. A member of the Jewish community had undergone the ceremony of betrothal, but not in the presence of a congregation (that is, ten adult males), and not followed by a written contract. In Jewish law that was an incomplete marriage, and the issue before the Court was whether this was a matter for the Rabbinical Tribunal to decide. The Court of Conflicts held that it was; because, if the religious courts were only to deal with marriage within the meaning of English law, they would be unable to pronounce effectively on matters of marriage. Again, the Court had to consider whether an agreement made by a guardian appointed by the Tribunal of the Greek Orthodox Church was valid when it was challenged, on the ground that the infants for whose benefit it was made had not agreed, and could not agree, to the appointment. The Supreme Court of Palestine and the Privy Council decided that the appointment was effective for this reason and the contract was not binding (*Kawas* v. *Kawas*, [1943] A.C. 532). Another case, which came before the Privy Council, raised neatly the vexed issue of *renvoi*, and provided the first decision on it of the supreme appellate tribunal of the Empire (*Kotia* v. *Nahas*, [1941] A.C. 403). A Lebanese domiciled in the Lebanon died intestate, leaving immovable property in Palestine. The District Court in Palestine applied to his succession the substantive rule of the Lebanese law, by which the widow was entitled to one-fourth of the property, and each of the two brothers of the deceased to three-eighths. By the Lebanese rules of private international law, the *lex situs* applied to immovables; the Palestine law of succession would give the widow the right to one-half. The Supreme Court and the Privy Council upheld the acceptance of the *renvoi* and the application of Palestine law.

Again, the Court has elucidated the peculiar character of Jewish divorce. A Supreme Court judgment described it as follows: 'A divorce under Jewish law is an act of mutual consent contracted between husband and wife and supervised by the Rabbinical authorities only so far as necessary to secure that all requirements of Jewish law in this respect have been fully observed. In any dispute between husband and wife as regards a divorce, the Rabbinical Court can only decide whether or not the wife is bound to accept a divorce from her husband. With the issue of an order to that effect, the jurisdiction of the Rabbinical Court as such ceases. There is no way of enforcing such a judgment except by using moral, religious, and social pressure on the parties to obey the order.' Similar considerations apply to Moslem divorce. An arrangement by a Moslem woman to pay a sum to her husband upon her remarriage in consideration of his divorcing her was held not to be contrary to natural justice or to public policy. That last unruly horse can hardly be ridden at all in the variegated society of Palestine —at least, in matters of personal status.

If we turn to the law of wills and succession, the incidents are not less interesting.

The Palestine Civil Court has held that an oral will, made by a Jew in the presence of three witnesses and confirmed after death by the Rabbinical Court, is valid, and any question concerning it is for the exclusive jurisdiction of the religious tribunal. In dealing with a more normal problem, where a Russian subject died intestate leaving immovable property in Palestine, the Court held that the principles of the English common law were applicable, since the Russian national law did not recognize succession. The English law referred to the *lex situs*, which is a modern Ottoman law enacted in 1913, and is in fact more liberal than the English Statute of Distributions.

Dr. Vitta is not reticent in criticisms of the judgment of the Supreme Court of Palestine, and even of the English High Court, when he thinks that there has been some grave departure from principle. Thus, where the Court of Criminal Appeal here had to deal with the vexed question of Palestinian citizenship, and it was urged by a Palestinian resident in England that, in virtue of a provision of the Treaty of Lausanne, he was a British subject and therefore not liable for penalties under the Aliens Act, but the Court rejected that plea because Palestine was a mandated territory and not part of the British dominions (*R.* v. *Ketter*, [1940] 1 K.B. 787), Dr. Vitta urges that it would have been a short and simple answer to the plea that Palestinians were British nationals in international law but not British subjects in our internal law. In a complex marriage case, where a Palestinian Jew married in Cyprus a woman of the Greek Orthodox community, by a civil ceremony, and subsequently brought an action for nullity of the marriage before the District Court of Palestine, that Court dismissed the claim, on the ground that it had no jurisdiction since the marriage was void *ab initio*, and therefore the wife was not a Palestinian. The Supreme Court, on the other hand, found itself unable to declare void a marriage celebrated abroad which was good and binding under the law of the place of celebration. Dr. Vitta suggests that, while the marriage was valid in form according to the law of Cyprus, it was void because of the incapacity of the husband by his national and personal law, in this case the Jewish law, to enter into it.

In spite of its somewhat specialized subject, and the apparent remoteness from our system, the book should have a general appeal to all jurists and students who are concerned with the development of private international law. It appears opportunely before the judicial connexion of England with Palestine is snapped, and before the guidance of British judges in the Supreme Court and the Privy Council is lost. It is well that a record of twenty years of judicial interpretation, fruitful in problems and fruitful in rulings, has been made. The book is well arranged and well produced, and equipped with a table of cases running over nearly twenty pages, and with a good index.

NORMAN BENTWICH

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